132-361

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1061. ~~834~~ ~~336~~ 112

SAM. KLEIN AND JOSEPH SEINSHEIMER, COMPOSING THE FIRM OF FRIEBERG, KLEIN AND COMPANY, PLAINTIFFS IN ERROR,

vs.

SOLOMON HOFFHEIMER, MAX HOFFHEIMER AND ABRAHAM HOFFHEIMER, COMPRISING THE FIRM OF HOFFHEIMER BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 2, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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a In the United States Circuit Court for Fifth Judicial Circuit and Northern District of Texas, Holding Sessions at Dallas.

Be it remembered that at a regular term of the United States circuit court for fifth judicial circuit of northern district of Texas, begun and held at Dallas, for the May term, A. D. 1886, to wit, on the third Monday, it being the 17th day, of May, A. D. 1886, when and where, among others, the following proceedings were had, to wit:

1 *Application for Garnishment. Filed Aug.* 14, 1885.

THE STATE OF TEXAS, *Dallas County:*

Whereas in a certain cause this day filed in the district court of Dallas county, wherein Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer, composing the firm of Hoffheimer Brothers, are plaintiffs, and Albert Strauss and J. J. Levy, composing the firm of Strauss & Levy, are the defendants, and wherein the plaintiffs sue to recover the sum of eleven thousand three hundred and twenty-nine & $\frac{79}{100}$ dollars, and [in] which said suit the said plaintiffs have this day applied for and procured the issuance of an original attachment against the property of said defendants, Strauss & Levy; and Abraham Hoffheimer, being by me duly sworn, says on oath that he is a member of the firm of Hoffheimer Brothers, plaintiffs in the above-described suit, and that said sum of eleven thousand three hundred and twenty-nine & $\frac{79}{100}$ dollars, sued for in the above-described suit, is a just debt against said Strauss & Levy, and that said defendants have no property within the knowledge of the affiant in their possession of which the debt can be made, and that affiant has reason to believe and does believe that Sam. Klein, who resides in Dallas county, Texas, and Joseph Sinsheimer, who is a resident citizen of Galveston county, Texas, composing the firm of Freiburg, Klein & Co., are indebted to said defendants, Strauss & Levy, or hath effects of said defendants in their hands.

——— ———.

Sworn to and subscribed before me this 14th day of August, 1885.

H. W. JONES,
Clk Dist. Court, Dallas Co.,
(Signed) By J. H. STEWART, *Dep't.*

Filed August 14, 1885.

H. W. JONES,
Clerk Dist. Court, Dallas Co.,
(Signed) By J. H. STEWART, *Dep't.*

2 *Writ of Garnishment. Issued Aug.* 14, 1885.

The State of Texas to the sheriff or any constable of Dallas county, Greeting:

Whereas, in the district court of Dallas county, in a certain cause wherein Solomon Hoffheimer, Max Hoffheimer, [and] Abraham Hoffheimer, composing the firm of Hoffheimer Brothers, are plaintiffs

and Albert Strauss and J. J. Levy, composing the firm of Strauss & Levy, are defendants, the plaintiffs claiming an indebtedness against the said Albert Strauss and J. J. Levy, composing the firm of Strauss & Levy, of eleven thousand three hundred and twenty-nine $\frac{79}{100}$ dollars, beside interests and costs of suit, have applied for a writ of garnishment against Sam. Klein and Joseph Seinsheimer, composing the firm of Freiberg, Klein & Co., and said Klein is alleged to be a resident of your county, therefore you are hereby commanded forthwith to summon the said Sam. Klein, if to be found within your county, to be and appear before the said court at the next term thereof, to be held in the city of Dallas, in said county, on the 12th day of October, 1885, then and there to answer upon oath what, if anything, he is indebted to the said Albert Strauss and J. J. Levy, composing the firm of Strauss and Levy, and was when this writ was served upon him, and what effects, if any, of the said Albert Strauss and J. J. Levy he has in his possession, and had when this writ was served; and what other persons, if any, within his knowledge, are indebted to the said Albert Strauss and J. J. Levy or have effects belonging to them in their possession. Herein fail not, but of this writ make due return as the law directs.

3 Witness my official seal and signature, at my office in the city of Dallas, Texas, on this 14th day of August, 1885.

[SEAL.] H. W. JONES,
Cl'k Dist. Court, Dallas Co.,
(Signed) By J. H. STEWART, *Dep't.*

Sheriff's Return.

Came to hand Aug. 14, 1885; executed same day received by delivering to Sam. Klein in person a true copy of this.

W. H. W. SMITH, *Sheriff,*
(Signed) By C. A. HASKELL, *Dep't.*

Writ of Garnishment. Issued Aug. 14, 1885.

The State of Texas to the sheriff or any constable of Galveston county, Greeting:

Whereas, in the district court of Dallas county, in a certain cause wherein Hoffheimer Bros., a firm composed of Solomon Hoffheimer, Max Hoffheimer, & Abraham Hoffheimer, are plaintiffs and Strauss & Levy, a firm composed of A. Strauss and J. J. Levy, are defendants, the plaintiffs claiming an indebtedness against the said Strauss and Levy of eleven thousand three hundred and twenty-nine & $\frac{79}{100}$ dollars, besides interest and costs of suit, has applied for a writ of garnishment against Frieberg, Klien & Co., a firm composed of Sam. Klein & Joseph Seinsheimer, who is alleged to be a resident of your county, therefore you are hereby commanded forthwith to summon the said Joseph Seinsheimer, of the firm of Freiberg, Klein & Co., if to be found within your county, to be and appear before the said court at the next term thereof, to be held in the city of Dallas, in said county, on the 12th day of Oct., 1885, then and there

4 to answer upon oath what, if anything, they are indebted to the said Strauss and Levy, and was when this writ was served upon him, and what effects, if any, of the said Strauss & Levy they have [in] their possession, and had when this writ was served, and what other persons, if any, within his knowledge, are indebted to the said Strauss & Levy or have effects belonging to *him* in their possession.

Herein fail not, but of this writ make due return as the law directs.

Witness my official seal and signature, at my office in the city of Dallas, Texas, on this 14th day of Aug., 1885.

[SEAL.] H. W. JONES,
Cl'k Dist. Court, Dallas Co.,
(Signed) By J. H. STEWART, *Dep't.*

Sheriff's Return.

Received this writ on the 15th day of August, A. D. 1885, at 11.45 a. m., and I executed the same on the same day, at 11.55 a. m., by delivering to the within-named Frieburg, Klein & Co., garnishees, through Joseph Seinsheimer, a member of said firm, in person, in the county of Galveston, a true copy of this writ of garnishment.

(Signed) WM. P. OWENS,
Sheriff Galveston Co.

Answer of Garnishee, Sam. Klein. Filed Oct. 14th, 1885.

Suit Pending in the Dist. Court of Dallas County. Oct. —, 1885.

HOFFHEIMER BROS.
vs. } 5551.
FRIEBERG, KLEIN & CO.

5 Now comes Freiberg, Klein & Co., garnishees herein, and, answering the writ of garnishment heretofore served upon them, say that they are not now indebted to Strauss & Levy or either of them, and were not indebted to Strauss & Levy or either of them when this writ was served; that they have no effects of Strauss & Levy or either of them in their possession, and had none when this writ was served; that they know of no person indebted to Strauss & Levy or either of them or who have in their possession effects belonging to Strauss & Levy or either of them.

FRIEBERG, KLEIN & CO.
(Signed) CRAWFORD & CRAWFORD, *Att'ys.*

Sam. Klein, being duly sworn, says that the matters stated in the foregoing answer are true.

(Signed) SAM. KLEIN.

Sworn to and subscribed to before me this Oct. 14th, 1885.

(Signed) H. W. JONES,
Cl'k Dist. Court, Dallas Co.

Filed Oct. 14, 1885.

H. W. JONES,
Cl'k Dist. Court, Dallas Co.

Answer of Garnishee, Sam. Klein. Filed Oct. 14th, 1885.

Suit Pending in the Dist. Court, Dallas Co. Oct. Term, 1885.

HOFFHEIMER BROS.
vs.
FRIEBERG, KLEIN & Co. } 5551.

Now comes Sam. Klein and, answering the writ of garnishment served upon him, says that he is not indebted to Strauss & Levy, or either of them, and was not when this writ was served; that he has no effects of said Strauss & Levy, or either of them, in his
6 possession, and had not when this writ was served; that he knows of no person who is indebted to Strauss & Levy, or either of them, or who has in their possession effects belonging to Strauss and Levy, or either of them. And now, having fully answered, garnishee prays to be discharged with his costs and att'ys' fees.

(Signed) CRAWFORD & CRAWFORD,
Att'ys for Garnishee.

Sam. Klein, being duly sworn, says that the matters stated in the foregoing answer are true.

(Signed) SAM. KLEIN.

Sworn to and subscribed to before me this Oct. 14, 1885.

(Signed) H. W. JONES,
Cl'k Dist. Court, Dallas Co.

Filed Oct. 14, 1885.

H. W. JONES,
Cl'k Dist. Court, Dallas Co.

Reply to Answer of Garnishees Controverting the Same. Filed Nov. 27, 1885.

In the District Court, Dallas County, Texas.

HOFFHEIMER BROTHERS
vs.
FRIEBERG, KLEIN & Co., Garnishees. } No. 5551.

Now comes the plaintiffs, Hoffheimer Brothers, to wit, Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer, and now here controvert the answer of the garnishees, Frieberg, Klein & Co., herein filed October 14, 1885; and also the separate answer of the garnishee, Sam. Klein, filed herein October 14, 1885, and here state that they, the plaintiffs herein, have good reason to believe and do believe that the said answers of the said garnishees are incor-

rect, for that in and by said answers said garnishees state
7 that they were not indebted to said Strauss & Levy, or either of them, at the time said writs of garnishment were served upon them, and were not so indebted at the time said answers were herein filed by them, and that they had no effects of said Strauss & Levy, or either of them, in their possession at the time said writs of garnishment were served upon them, and had no such effects in their possession at the time they filed their answers herein. Now these plaintiffs are informed and believe that, to wit, August 10, 1885, prior to the issuance and service of said writs of garnishment, that said garnishees combined, colluded, and confederated together with said Strauss & Levy for the purpose and with the intent to hinder, delay, and defeat the creditors of said Strauss & Levy in the collection of their debts, and that in furtherance of said combination, at said time and with the intent aforesaid, said garnishees secretly and covinously procured and received from said Strauss & Levy all the books, accounts, notes, choses in action, and other evidences of indebtedness then owing to said Strauss & Levy by divers and sundry persons to these plaintiffs unknown, but amounting in the aggregate to about the sum of thirty-two thousand dollars, and that said garnishees thereafter immediately commenced to collect said claims, pretending to be owners thereof. These plaintiffs are not informed as to the amount of such claims which had been collected by said garnishees at the time said writs of garnishment were served upon them, nor at the time their said answers were filed herein, but they are informed and believe that at the time the writs of garnish-
ment were served, as well as at the time said answers were
8 filed, that said garnishees had then collected a very large amount upon said claims—it is believed more than sufficient to pay off and discharge the claims of these plaintiffs against said Strauss & Levy—and that the said garnishees then had and still have the money so collected, and that said garnishees then had in their possession said claims not so collected by them; and plaintiffs are informed and believe that said garnishees still continue to collect and realize upon said claims.

Whereupon these plaintiffs say that they have good reason to believe and do believe that said garnishees did have in their possession effects belonging to said Strauss & Levy, both at the time said writs of garnishment were served upon them and at the time they filed said answers herein; and also that they were indebted to said Strauss & Levy at said time, and that therefore the answers of said garnishees are incorrect in the particulars herein stated. The premises considered, they pray that the court will have proof and for judgment against said garnishees for the amount of their said debt against said Strauss & Levy, & for general relief, &c.

(Signed) SOLOMON HOFFHEIMER.
(Signed) MAX HOFFHEIMER.
(Signed) ABRAHAM HOFFHEIMER.

STATE OF OHIO, *Hamilton County:*

Before me, P. P. Casey, the undersigned, a notary public in and for the county of Hamilton, State of Ohio, this day personally appeared Abraham Hoffheimer, to me well known, who, after being by me duly sworn, deposes and says that he is a member of —
9 Hoffheimer Brothers, and one of the plaintiffs in the above entitled and numbered cause; and that he has read the above and foregoing statement controverting the answers of the garnishees therein named and knows the contents thereof, and that the same is true, except as to the matters therein stated on information and belief, and that as to such matters that he believes it to be true.

(Signed) ABRAHAM HOFFHEIMER.

Sworn to and subscribed before me this twenty-first day of November, 1885.

Witness my hand and official seal.

(Signed) P. P. CASEY,
Notary Public, Hamilton County, Ohio.

Filed Nov. 27, 1885.

(Signed) H. W. JONES,
Cl'k Dist. Court, Dallas Co.

THE STATE OF TEXAS, *County of Dallas:*

I, H. W. Jones, cl'k dist. court, Dallas county, do hereby certify that the above and foregoing 13½ pages contain a correct copy of all the proceedings had in the case of Hoffheimer Bros. *vs.* Freiberg, Klein & Co., No. 5551, as the same appear on file in my office.

Witness my official seal and signature, at office in the city of Dallas, this Dec. 18th, 1885.

H. W. JONES,
Cl'k Dist. Court, Dallas Co.

(Signed) By J. H. STEWART, *Dep'ty.*

10 *Bill of Costs.*

Filing and docketing applications	35
Taking 1 affidavit	25
Issuing 2 writs [of] garnishment, Dallas & Galveston counties	1 50
Sheriff, W. H. W. Smith	1 10
" Wm. Owens, Galveston Co.	1 00
Taking 3 affidavits	75
Filing 3 papers	45
Making transcript	5 00
Taxing costs	25
Total	$10 65

(Endorsed:) In U. S. cir. court, Dallas, Texas. No. 853. Hoffheimer Bros. *vs.* Freiberg, Klein & Co., garnishees. Transcript from district court of Dallas county. Filed Dec. 28, 1885. A. J. Houston, clerk, by Jas. D. Adams, deputy.

11 HOFFHEIMER BROS.
vs.
FRIEBERG, KLEIN & Co., Garnishees. } 853.

On Thursday, June 10th, 1886, came the parties, by their attorneys, and thereupon came a jury of good and lawful men, to wit, R. H. Fisher, Jas. Mooreland, Howard Pickett, J. T. Dugger, J. B. Choice, R. W. Yeargan, Jno. L. Duff, Ben. T. Rowe, J. B. Slavin, A. T. Metcalf, A. Douglass, and H. C. Kelley, who were duly empanelled and sworn; and, having heard the evidence, argument of counsel, and charge of the court, returned into court the following verdict, to wit:

"We, the jury, find for the plaintiff, and our verdict is that he recover from the garnishees the sum of $11,329.79.

"(Signed) HOWARD PICKETT, *Foreman.*"

It is therefore considered by the court that the plaintiffs, Solomon Hoffheimer, Max Hoffheimer, & Abraham Hoffheimer, in their firm name of Hoffheimer Brothers, do have and recover of and from the garnishees, Sam. Klein and Joseph Seinsheimer, in their firm name of Frieberg, Klein & Co., and also against the said Sam. Klein and Joseph Seinsheimer, individually, the sum of eleven thousand three hundred and twenty-nine & $\frac{79}{100}$ dollars, with interest thereon from this date at the rate of eight per cent. per annum, together with all costs in this behalf incurred, for which they may have their execution. It is further considered by the court that when the above amount or any part thereof is collected by or paid to said plaintiffs it shall constitute a credit to the amount so collected or paid on a judgment in favor of plaintiffs against Strauss & Levy for the sum of eleven thousand seven hundred and eighty-seven & $\frac{15}{100}$ dollars, rendered by this court, May 22, 1886, in cause No. 852, wherein Hoffheimer Bros. are plaintiffs and said Strauss & Levy are defendants.

12 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

HOFFHEIMER BROS.
vs.
FREIBERG, KLEIN AND Co., Garnishees. } No. 853.

Now, on this day, comes the defendants in the above-entitled cause and moves the court to set aside the verdict and judgment rendered in this cause and grant them a new trial, for the following reasons:

1. Because the verdict of the jury is contrary to the evidence and is not supported by the evidence.

2. Because the evidence shows that the verdict of the jury, if responsive to the issues submitted to the jury, should have been in favor of the defendants.

3. Because the court erred in its charge to the jury as follows: "A failing debtor has the right to pay one creditor in full though he may not be able to pay the others anything, and a *bona-fide*

creditor of failing debtor may receive satisfaction of his debt in the transfer of bills receivable as well as in money, but is required to exercise the utmost good faith in such a transaction, and to take no more in value than is reasonably adequate to pay his debt, and to so deal with said failing debtor as only to obtain satisfaction in
13 good faith of his own debt, and not use his own debt, however honest it may be, as a shield to said debtor or an impediment to other creditors in reaching other assets of said failing debtor."

And the court further erred in its charge to the jury as follows:

"If, then, you believe from the proof in this case that the plaintiffs have a valid, subsisting, unsatisfied judgment against Strauss and Levy for something over eleven thousand dollars, or the amount claimed by them, and that Strauss and Levy were insolvent on the 10th day of August, 1885, and that the fact of said insolvency was then known to Sam. Klein, or such facts with reference to them were then known to him as would have prompted a reasonable and fair-minded man to make enquiry in reference thereto, and that such enquiry would have resulted in a knowledge of said fact, and that under these circumstances said Sam. Klein, on behalf of the garnishees, took the bills receivable aforesaid, and that the garnishees have received, and for the purposes of this litigation now have, of the proceeds of said bills receivable the sum of near ten thousand dollars (exact sum is shown by the proof as said above), and have still uncollected bills of value, you will find the garnishees liable to the plaintiffs in the amount so collected and the value found by you of the bills uncollected found by you—that is, return a ver-
14 dict for the plaintiffs for the amount so shown by the proof to have been received nett by said garnishees and the value of the uncollected bills, if the sum of these do not exceed plaintiffs' debt, unless you believe from the proof that the garnishees were in fact and in good faith creditors of Strauss and Levy in the full sum claimed by said garnishees, and that in the dealings of Sam. Klein on behalf of the garnishees with Strauss and Levy, on the 10th day of August, by which he obtained said bills receivable and cancelled the garnishees' claim against Strauss and Levy, were in fact fair and honest and had with the single purpose of obtaining satisfaction of said debt, and that he received no more therefor than was reasonably worth the amount of said garnishees' said debt."

And the court further erred in its charge to the jury as follows:

"If the proof does so satisfy you of the honest fairness of garnishees' claim against Strauss and Levy, and of the honest fairness of Sam. Klein's dealings with them on the 10th of August, 1885, and that he received no more from them than was reasonably sufficient to satisfy the garnishees' demand, you will find for the garnishees."

And the court further erred in its charge to the jury as follows:

"Any subsequent conduct of Sam. Klein in reference to the demands of other creditors cannot effect his dealings with Strauss and Levy further than as circumstances which it is proper for you
15 to consider in determining whether said Sam. Klein in his

dealings, on the 10th of August, 1885, with Strauss and Levy was acting in perfect good faith and with the sole purpose of obtaining satisfaction of an honest debt due the garnishees, as they claim."

4. The court erred in refusing to give the special charges Nos. 1, 2, and 3 asked by the defendants' counsel and refused by the court, which charges are as follows:

No. 1. "The various attachment suits against Strauss and Levy, in which Hoffheimer Brothers intervened, mentioned in the evidence, having all been reduced to judgment and determined in favor of the validity of the debts sued for in such suits, you cannot regard the debts so sued for as ficticious or fraudulent, but [they] must be considered as valid claims against Strauss and Levy."

Nos. 2 and 3. "If you believe from the testimony that Strauss and Levy borrowed money from Freiberg, Klein and Co., and deposited with them notes belonging to Strauss and Levy as collateral for such money, then the plaintiffs cannot recover in this action until said money so borrowed has been repaid." "The presumption of law is that the answer of the garnishees is true and the burden of proof is upon the plaintiff to show that it is incorrect"

5. The court erred in its instructions to the jury that they could find the value of the notes and accounts uncollected in the hands of the defendants as garnishees, and upon the value so as-
16 sessed by them they could compute and estimate in their verdict.

6. The court erred in not excluding testimony objected to by the defendants' counsel as per bills of exception herewith filed, and in admitting testimony over the objections of defendants' counsel, as shown by the defendants' exceptions.

(Signed) WRIGHT, WRIGHT AND ECKFORD,
" CRAWFORD AND CRAWFORD,
Attorneys for Defendants.

The court erred in not directing a nonsuit, or, in the alternative, a verdict for the garnishees upon the motion of the defendants after the evidence had been received and it had developed that the garnishees at the time of the service of the writ of garnishment and the making of the answer thereto *that they* had in their hands no effects of Strauss and Levy, but had only choses in action not recoverable by process of garnishment.

(Signed) WRIGHT AND WRIGHT.
" CRAWFORD AND CRAWFORD.

(Endorsed:) No. 853. Hoffheimer Bros. *vs.* Freiberg, Klein & Co., garnishees. Defendants' motion for new trial. Motion docket No. 52. Filed June 12, 1886. A. J. Houston, clerk, (signed) by Jas. D. Adams, deputy.

17 In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

HOFFHEIMER BROTHERS
vs.
FREIBERG, KLEIN & Co., Garnishees. } No. 853.

Now, on this day, comes the defendants in the above-entitled cause and moves the court to arrest the judgment rendered herein for the following reasons:

1. Because the court had no jurisdiction to try the matters and things involved in this controversy.
2. Because the pleadings and the evidence in the case show that a court of common law has no jurisdiction to try the issues involved in this controversy.
3. Because the court had no jurisdictional right to render a judgment upon the issues disclosed by the pleadings and the evidence.
4. Because it is apparent upon the face of the record that this court has no rightful jurisdiction of this cause.

(Signed) WRIGHT, WRIGHT & ECKFORD,
CRAWFORD & CRAWFORD,
Attorneys for the Defendants.

(Endorsed:) No. 853. Hoffheimer Brothers *vs.* Freiberg, Klein & Co., garnishees. Motion in arrest of judgment. Filed June 19, 1886. A. J. Houston, clerk.

18 HOFFHEIMER BROS.
vs.
FRIEBERG, KLEIN & COMPANY. } 853.

This day came the parties and then came on to be heard the motion of garnishees, Freiberg, Klein & Co., for a new trial, and the matters therein having been heard it is considered by the court and so adjudged that the said motion be, and the same is hereby, overruled; to which ruling the garnishees except. Then also came to be heard garnishees' motion in arrest of judgment, which, having been heard by the court, it is considered and so adjudged that the same be and is overruled; and the garnishees except [to] this order of the court, and the garnishees then in open court gave notice of writ of error to the Supreme Court, with supersedeas; and it is thereupon considered by the court and so adjudged that the said writ of error, with supersedeas, be, and is hereby, allowed upon the said garnishees filing with the clerk of this court within the time required by law a bond for the sum of sixteen thousand dollars, conditioned as required by law, for the security of the defendants in error and the prosecution of said writ of error, with two or more good and sufficient sureties thereto. And it is further ordered that the garnishees shall have twenty days from this date within which they may file their bills of exception, because it appears to the court that there is not sufficient time remaining of the term for the preparation thereof.

19 HOFFHEIMER BROS. *vs.* FREIBERG, KLEIN & CO. } No. 853.

Be it remembered that heretofore, to wit, June 10th, 1886, before the Hon. A. P. McCormick, district judge, in and for the northern district of Texas, holding a term of the circuit [court] of the United States for said district, at Dallas, Texas, the above-entitled cause came on for trial before a jury, duly empaneled and sworn; and the plaintiffs, to maintain the issue on their part, offered in evidence—

1. The pleadings in the case of Hoffheimer Bros. *vs.* A. Strauss and J. J. Levy, partners under the firm name of Strauss & Levy, numbered 852 on the docket of this court. Said suit was an action of debt, filed by plaintiffs against Strauss and Levy, upon notes and acceptances, for about $11,787.00, all of which were executed by them from Jan'y 10 to July, 1885. Said suit was instituted in the district court of Dallas county, Texas, August 14th, 1885. A writ of attachment was sued out therein, and, on August 14th, 1885, the writ of garnishment to Freiberg, Klein & Co., the same out of which this trial arose, was sued out by the plaintiffs and served on the same day on Sam. Klein, one of partnership of Freiberg, Klein & Co. It appears from said petition and application for garnishment that all the plaintiffs were citizens of the State of Ohio, and that Strauss & Levy and the garnishees, Freiberg, Klein & Co., were all citizens of the State of Texas, Sam. Klein being a resident of Dallas county.

On the petition of Strauss and Levy, cause No. 852, Hoffheimer Bros. *vs.* Strauss and Levy, was removed from the district court of Dallas county into this court, and a transcript of said cause
20 and of the proceedings in garnishment duly filed in this court. On May 22, 1886, judgment was rendered in said cause No. 852 in favor of Hoffheimer Bros. against Strauss & Levy for the sum of $11,787.15, besides costs of suit, with foreclosure of attachment lien, subject to prior attachments in excess of the value of the goods seized thereunder.

2. And, to further sustain the issues on their part, the plaintiffs offered A. Hoffheimer as a witness, who said that he was one of the plaintiffs; that they lived and did business at Cincinnati, and were citizens of the State of Ohio; that he came to Dallas August 14, 1885, and saw that all the stock of Strauss & Levy had been seized under attachments for more than its value, and that they had no other property that he could find, and were insolvent. They did a liquor and sugar business. Witness enquired for the books of Strauss & Levy; heard that Sam. Klein, one of the garnishees, had them; went to see him and asked to see the books and he told me that they had been sent to the office of Freiberg, Klein & Co., at Galveston, Texas, and I could see them there. This was on Saturday, June 15th, after the garnishment had been served on him. I went to Galveston on Monday; called at the office of Freiberg, Klein & Co. and asked Seinsheimer, one of the garnishees, to let me see the books of Strauss and Levy. He had a telegram from Sam. Klein, which he read [to] me, saying not to show the books. I told him I had consulted

counsel and they told me I had a right to see the books. He said he would see his counsel; went off and returned, saying that his advice was not to show the books.

3. And, to further maintain the issues on their part, the plaintiffs introduced J. Spahr as a witness, who said that he lived in
21 Dallas, and knew Strauss & Levy. They failed on August 11th, 1885, and were attached. They owed a debt to a party for whom I was agent, and I attached some cigars August 11th, which they ran over to Wagner's store. They did not sell for enough to make my debt. I have never been able to find anything to levy on since.

4. And then plaintiffs, to further maintain the issues on their part, read the deposition of J. W. Edmondson, who said that he lived in Galveston and was in the employ of Marx & Kempner, and knew both Strauss & Levy; at that time, Jan'y 26, 1886, Levy was in the employ of Frieberg, Klein & Co., and Strauss of Ullman, Lewis & Co., of Galveston; that on August 11th, 1885, attachment suits were instituted by Marx & Kempner, Oliver & Griggs, Crawford & Crawford, Wertheim & Schiffer, and Addie Lowenstein against Strauss & Levy, in the district court of Dallas county. Crawford & Crawford were attorneys for all the plaintiffs, and filed the suit for Marx & Kempner by authority of Sam. Klein, so Klein, Strauss and Levy and M. L. Crawford told me. The notes evidencing the indebtedness of Strauss & Levy to Marx & Kempner were then in their possession at Galveston. Witness further said: I had a conversation with Strauss & Levy in the Windsor Hotel, at Dallas, Texas, about September 2, 1885. Sam. Klein, M. Marx, A. Strauss, & J. J. Levy were present. Strauss & Levy said that they had received a telegram from Hoffheimer Bros. on the 10th of August, about 9 or 10 o'clock at night, which referred to their matters in such a way as to alarm them; that they went with the telegram to Sam Klein, and about one o'clock that night they went with Klein to the house of M. L. Crawford, Esq., and there conferred together, and it
22 was then agreed between all of them that confidential debts should be attached for as follows: Crawford & Crawford, Marx & Kempner, Wertheim & Schiffer, Oliver & Griggs, and Addie Lowenstein. Crawford & Crawford were to come first and Marx & Kempner next, but Sam. Klein had it fixed so next day, when the attachments were levied, that Oliver & Griggs was levied ahead of Marx & Kempner. Levy was particularly incensed at this because his brother-in-law, August Cohn, was indorser on one of the notes sued on by Marx & Kempner. He said that it was particularly understood when they attached that the August Cohn note should first be paid; he then demanded an indemnity from Marx for Cohn against said note, claiming that the goods attached were enough to cover that amount anyhow, and, whatever became of the balance, that note must be paid and August Cohn not bothered. Levy said that he had taken legal advice and would knock all the attachments out of court and give away how the whole thing was done, and let none of the confidential debts be paid, — a dollar, rather than Cohn should suffer. Levy also said the Oliver & Griggs attachment was

not worth a cent, because he gave the note sued on by them after the attachment; that the note sued on was not in existence when the suit was filed. The note of Oliver & Griggs did not provide for attorneys' fees, as alleged in the petition, and he made a note the next day to fit the allegations. Sam. Klein concurred in all that Strauss & Levy said. He said, also, that he took the books, accounts, and notes of Strauss & Levy for the debt they owed Freiberg, Klein & Co. Witness further said a part of the claim sued on by Marx & Kempner was a note for $1,250, made by Strauss & Levy
23 and endorsed by August Cohn. Levy contended that this note should be paid, and that it was the understanding of all the parties. The controversy between Marx & Kempner and Strauss & Levy was finally settled in this way: In consideration of the agreement of Marx & Kempner to hold August Cohn harmless as indorser they gave Marx & Kempner a note of August Cohn for $800.00, indorsed by Strauss & Levy and by Frieberg, Klein & Co.

And be it remembered that defendants objected to the introduction of so much of the testimony of the witness Edmondson as related to the conversations between himself and J. J. Levy, and to all the statements and declarations of the said Levy, because the same were hearsay and irrelevant and referred to transactions occurring after the sale of the notes and accounts by Strauss & Levy to Frieberg, Klein & Co., and was calculated to prejudice the jury against defendants. And for the same reasons defendants objected to the introduction of the statements made by Klein; but the court overruled the objections and permitted the testimony to go to the jury; to which ruling the defendants then and there excepted.

And, to further maintain the issues on their part, plaintiffs read a letter attached to the deposition of Edmondson, M. Marx, and H. Kempner as an exhibit and identified by them as a letter written by J. J. Levy to M. Marx, as follows:

DALLAS, TEXAS, *Aug.* 31, 1885.

M. Marx, Galveston, T'x.

DEAR SIR: When you were here on Saturday last you *have* told me that the $1,250.00 note you discounted for us on July 31st
24 is all right. Strauss says that you have spoken to August Cohn to the contrary. Now, you well know that all parties concerned have agreed not to let A. Cohn suffer, nor shall he do so. When we attached for M. & K., the first consideration was the $1,250.00 note. There is enough here to cover that amount. I request you to let me know by return mail whether this is all O K, and oblige,

Yours truly, J. J. LEVY.

To the reading of this letter in evidence the defendants objected, because the same was irrelevant to any issue involved in this trial, was hearsay, and tended to prejudice and mislead the jury; but the court overruled the objection and permitted the letter [to be] read to the jury; to which action of the court defendants then and there excepted.

5. And, to further maintain the issues on their part, plaintiffs read in evidence the depositions of M. Marx, which are substantially the same as those of J. W. Edmondson, so far as stated above. Marx also stated that he was a member of the firm of Marx & Kempner; that the notes held by them against Strauss & Levy were in their possession, in Galveston, on August 11, 1885, and that they had no knowledge of the bringing of the suit against Strauss and Levy until the next day. He repeated the conversation with Klein, Strauss, and Levy at the hotel in Dallas on Sept. 2d, as stated by Edmondson, and added further that Klein then, in explanation of why Oliver & Griggs' attachment was given precedence over that of Marx & Kempner, said that he was under some obligations to Oliver & Griggs to see that they did not lose anything; and, furthermore, that it would have a better effect to put Oliver & Griggs ahead, as they were residents of Dallas. Marx said further: We released August
25 Cohn as indorser on the $1,250.00 note by taking his note, Sept. 2, 1885, payable to Freiberg, Klein & Co. and indorsed by Freiberg, Klein & Co. and A. Strauss & J. J. Levy.

And be it remembered that to the introduction of this testimony defendants objected, because the same was immaterial and irrelevant, did not tend to prove any issue in the case, and was calculated to prejudice and confuse the jury; but the court overruled the objection and permitted the evidence to be read to the jury; to which action of the court defendants then and there excepted.

6. And, to further maintain the issues on their part, the plaintiffs read in evidence the deposition of H. Kempner, who said: I had a conversation with Sam. Klein, in Galveston, in the street, on Sunday morning, shortly after the attachment suits had been instituted; asked him this question: Now, Mr. Klein, being that you were the leader and manager of the attachment suits, why is it that you did not carry out the instructions of Strauss & Levy to put Marx & Kempner second in the order of attachments? He replied that he felt in honor bound to put in Oliver & Griggs ahead of Marx & Kempner, because he had recommended them for accommodation; as for the others, that was done by the attorneys. He said that he had done all that he could for Marx & Kempner; that Strauss had insisted that Addie Lowenstein should be put in as a creditor in attachment for $3,000, but he, Klein, objected, and it was compromised on the $1,000.00 named in her suit. She is the sister-in-law of Strauss; to the introduction of which the defendants objected, because the testimony was not pertinent to any issue in the case,
26 related to a different transaction, was calculated to mislead the jury, and prejudice them against the defendants: but the court overruled the objections and permitted the deposition to be read to the jury; to which action of the court the defendants then and there excepted.

7. And, to further maintain the issues on their part, the plaintiffs read in evidence a portion of the depositions of Joseph Seinsheimer, one of the defendants, in answer to interrogatories propounded by the plaintiffs.

In answer to the second interrogatory witness attached a list of

the notes turned over by Strauss & Levy to Freiberg, Klein & Co. Their face value amounts to $11,751.79.

In answer to the 3d interrogatory he attached a list of accounts and bills turned over to them. This is marked Exhibit B, and is a full statement, with the exception of some old claims and judgments in the hands of Dickson and Maroney, Dallas, for collection and which are considered of no value. Exhibit B foots up $11,138.33, but he said that the face of both notes and accounts is largely in excess of their actual value.

In answer to the 6th interrogatory, calling for a detailed statement of the money collected on these notes and accounts, the witness said there has been collected $9,800.42, which is the net proceeds collected as per detailed statement attached, marked Exhibit C. The exhibit shows gross collections made to May 1, 1886, $12,16541. Against this was charged up certain expenses incident to the collection, aggregating $2,362.99. Of this they make fee paid Wright, Wright and Eckford $250.00, and another item is "attorneys' fees and travelling
27 expenses, $2,000.00. Wright, Wright and Eckford are their attorneys in this case. Said Exhibit C further shows that on October 14th, 1885, when the plaintiffs filed their contest of the garnishees' answer, the gross amount collected on said notes and accounts amounted to $2,923.61.

8. And, to further maintain the issues on their behalf, the plaintiffs read in evidence a part of the depositions of Sam. Klein, in answer to interrogatories propounded by plaintiffs, as follows:

He said we did not take all of the notes and accounts that Strauss & Levy had on August 10th, 1885. The books and papers were sent by me to Freiberg, Klein & Co. at Galveston, and have been in their possession ever since, excepting the time the books were in this court. The notes were collected as they matured, excepting such as were not paid. The books, notes, and accounts are all kept at the office in Galveston, and for this reason I cannot attach a list of them to my answers. It is my impression that the amount collected on the notes and accounts turned over to us by Strauss & Levy has to date (May 11, 1885) not exceeded $10,000.00. Not having access to the books of Freiberg, Klein & Co., which are in Galveston, I cannot state the exact amount.

To interrogatory 10, which is as follows: "Have not Strauss and Levy or either of them collected some of said notes and accounts? Have they not had them or some of them in their hands for collection?" the witness answered: "J. J. Levy, who is in our employ as travelling salesman and collector, has collected some of these notes and accounts, the amount of which I do not recollect. It is my impression, and I am reasonably sure, that Strauss did not collect
28 any. Levy collected some of the accounts, the same as any other of our travelling men whose business it is to sell and collect."

To the 11th interrogatory, viz.: When you received the notes and accounts of Strauss and Levy, did you not know that they were indebted to Hoffheimer Bros.? to which he answered: "I did know

that they were indebted to Hoffheimer Bros., as well as to various other parties, in large amounts, but they owed to none as much as they owed to us. I took these notes and accounts from Strauss & Levy in payment of their debt to Freiberg, Klein & Co., but I am reasonably sure that they will not pay us more than eighty-five cents on the dollar of our debt."

And here the plaintiffs rested.

It is agreed that at the time the application was made in the district court of Dallas county to remove the case of Hoffheimer Bros. *vs.* Strauss & Levy this garnishment proceeding was pending & had been docketed as a separate cause in said court; that no separate application for the removal of said garnishment proceeding was made, but the same was ordered removed by said court as an issue in and a part of the cause of Hoffheimer Bros. *vs.* Strauss & Levy, and that no motion to remand this proceeding has been made.

29 1. And the garnishees, defendants hereto, to maintain the issues on their behalf, read from the deposition of Joseph Seinsheimer, taken by plaintiffs, as follows: The matter of receiving the notes and accounts from Strauss & Levy was attended to by Sam. Klein. So far as I am informed and believe, only a portion of the notes and accounts of Strauss & Levy were received by us on August 10th, 1885, or at any other time. We did not receive the books at that time, but subsequently some of the accounts were disputed and we obtained the books relative to said accounts for the sole purpose of verifying the accounts we had received. The notes and accounts taken by us were taken in payment of a debt of $15,789.00 owing to Frieberg, Klein & Co. by Strauss & Levy, being $15,107.34 principal and $681.25 interest, due us on August 10th, 1885.

2. And, to further maintain the issues on their part, the garnishees offered Sam. Klein as a witness, who said I am a member of the firm of Freiberg, Klein & Co., and reside in Dallas; spend about 335 days in the year here; the remainder in Galveston. J. J. Levy was first in business in Dallas, as wholesale dealer in liquor and cigars, and in partnership with Larry Klein. About December, 1883, Larry Klein withdrew and A. Strauss became a partner; the firm was then Strauss & Levy.

On August 10th, 1885, Strauss & Levy owed us about $15,700.00. On that day, just after dinner, I was in the office of Strauss &

30 Levy when Mr. Bradford, a lawyer, came in. He had a paper in his hand and demanded payment of a claim not then due. They said they would pay it when due, and Bradford talked about suing them. I knew that Bradford was the attorney for the Bradstreet Commercial Agency. I became alarmed and demanded payment of our debt. They said that they did not have the money. I asked what else they had, and they replied notes and accounts, and they assigned them to us in payment of our debt. They owed us paper that was past due, and I knew they were hard up from commercial reports, and when I heard [of] Bradford trying to collect a debt not due I demanded payment of our debt.

Some days after I got the notes and accounts, and before I was served with the writ of garnishment, I proposed to Hoffheimer that, if he would pay our claim less $3,000, I would give him all the notes and accounts. The notes and accounts will not pay us out. My purpose in taking them was to get what Strauss & Levy owed us, and had no idea then that Strauss & Levy were going to be attached. Late on the night of the 10th Mr. Reinhardt came to my house and showed me a telegram and said that Strauss & Levy were outside and wanted to know what to do about their business matters. I told them to go and see Crawford & Crawford. At their solicitation I went with them to the residence of M. L. Crawford. After one o'clock a. m., on the 11th, immediately after seeing Crawford, he said that his papers were ready and he was going to attach. This was the first intimation I had that any attachments would be levied. We did not take the books at once. Strauss & Levy gave them to us because we could not sue on some of the claims without them.

31 Witness was read the deposition of Kempner, detailing the conversation with him, and he denied saying any such things as stated by Kempner. He also denied having the conversation testified to by Edmondson & Marx at the Windsor Hotel, Sept. 2, 1885. He said that there was some conversation between Marx and Edmondson and Strauss & Levy which he did not hear; that he made no such remarks as were testified to by Marx & Edmondson.

On cross-examination witness said I did not keep an office with Strauss & Levy, but at the store of Reinhardt, who is my brother-in-law. The debt due us by Strauss & Levy was evidenced by notes. I did not have the notes with me, but only a statement of the indebtedness, for which I had sent to Galveston. I sent for it on account of the rumors that they were hard up. I gave Strauss & Levy a receipt against the notes for the whole debt and took a written transfer of the notes and accounts on the afternoon of the 10th. A statement of the amount of each account was taken from the books, and each statement indorsed to us by writing thereon "For value received we transfer to Frieburg, Klein & Co." Each note was so indorsed also. This was the case with all, except some in the hands of Dickson and Maroney for collection. I got them all that evening, and a few days after sent them to Galveston. I do not remember when I got the books. They were in the house on the 11th, when the attachments were made. I had a list of the notes and accounts transferred. It is either in our possession or Levy's. I did not tell anybody that I had the accounts and notes. Strauss & Levy had other notes and accounts and a stock of goods. I do not remember if I picked out the notes and accounts. I did not then think

32 the notes and accounts I had were worth over ten thousand dollars. I could not get them to give me any more than I got. I did not look to see if they picked out for me the worst notes and accounts. The stock on hand was worth about $22,000.00. I bought it in a sale made by order of the district court of Dallas county for $14,000.00. The sale was by public auction. I do know Paschal Tucker. He had been book-keeper for Strauss & Levy.

He moved to Brownwood. I hear he is keeping a store there. I have never been in it. None of Strauss and Levy's goods were shipped to Tucker. He received none of them. I shipped them all to Freiberg, Klein & Co., at Galveston. I might have said, when a witness in this court last term in the Oliver & Griggs case, that I had got from Strauss & Levy accounts and notes amounting to $25,000 or $26,000. I had no evidence then of the amount. Rhinehart came to my house at night on the 10th with Strauss & Levy. At their persuasion I went with them to Judge Crawford's. I went with them from there to Crawford's office. It was early in the morning. I went to sue out attachment for Marx & Kempner. I intended to make the affidavit for Marx & Kempner's attachment. My name was signed to that affidavit for attachment in the case of Marx & Kempner and Addie Lowenstein; do not remember what the ground of the attachments were.

(Here counsel for plaintiff read to him the affidavits in the case of Lowenstein and Marx & Kempner against Strauss & Levy, which contains this clause: "That the defendants, Strauss & Levy, have disposed of their property, in whole or in part, for the purpose of defrauding their creditors.")

33 Witness said he he did not still remember what was in the affidavit nor did he remember why he did not make them; did not remember if he signed any attachment bonds.

(Here it was agreed by the parties that the attachment affidavits of Marx & Kempner & Addie Lowenstein were signed by Sam. Klein originally; that he intended to make the affidavits, and went to the clerk's office for that purpose; that Judge Crawford hurried off to levy the first three attachments on the goods, and, by mistake, had these affidavits along with him; that Klein waited some time for his return, and finally, being sick, went home before Crawford returned, and other persons made the affidavits instead. He signed the attachment bond of Lowenstein as surety, and also of Oliver & Griggs.)

Freiberg, Klein & Co. employed J. J. Levy as travelling salesman about a month after August 10th, 1885. Strauss was also employed by them about the first of February last; both are in our employ now. I do not remember what claims Levy collected out of those assigned. I gave them to him and took his receipt for them. I have not the receipt with me. He was to collect them for account of Freiberg, Klein & Co., just as any other of our traveling men made collections for us. Dickson & Maroney turned over to me a lot of notes and accounts in their hands; I have no list of them. The evidences of the debt from Strauss & Levy to Freiburg, Klien & Co. consisted of notes. I think we surrendered the notes to them before Christmas of 1885, before January 3rd anyhow. I cannot state the date. I do not know whether Strauss & Levy have the notes now or not; do not know whether my attorneys have them or not.

34 The first debt to us was by J. J. Levy & Co., in 1883. They owed us about $14,000.00. Strauss bought into the firm about the last of 1883. Strauss & Levy assumed the debt almost

entirely. They gave us their notes, thirteen in number, for $1,000.00, each due at 30 days for the first, and made all the remainder of the notes due 30 days apart. We took J. J. Levy's individual note for the balance, about $1,500.00. J. J. Levy & Co. owed us for goods and borrowed money; cannot tell the proportion of cash. They paid some of these notes as they fell due. All were not paid Jan'y 1, '85; do not know how many at that date remained unpaid. Strauss & Levy owed us about $16,000.00 for money and goods subsequently loaned and sold them. They got some money by express and some by draft. Seinsheimer has the drafts. They gave us some collaterals when they borrowed the money. The collaterals consisted of notes. The agreement was that they should keep collaterals in our hands amounting to two dollars for every one loaned. The collaterals were not quite two for one of their debts. We returned the collaterals to them, when due, for collection and remittance to us. They never sent us the money collected. Their debt was not reduced. They never paid anything on their debt to us. We had some collaterals at the time of the failure; do not know how much. The business of Freiberg, Klein & Co. is wholesale liquors and cigars. We sometimes loan money and do a brokerage business. We never discounted any notes for Strauss & Levy. We lent money to persons not in our business. We were creditors of Rhinehardt, dealer in clothing, when he failed. We were also attaching creditors of Loeb & Freeberg when they failed, and also of Cohn & Baum and of Ike Loeb.

Re-examined by garnishees, the witness said: (The witness was here shown the assignment of the notes and accounts.) He said this paper was written by me on the day I took the assignment of the notes and accounts and was signed by Strauss & Levy. The paper was then read in evidence by the garnishees as follows:

"DALLAS, TEXAS, *August 10th*, 1885.

"For value received of Frieberg, Klein & Co., and in full consideration of fifteen thousand seven hundred & eighty-nine $\frac{8}{100}$ dollars, indebtedness due by us to said Freiberg, Klein & Co., and in full payment and satisfaction of said indebtedness, we do hereby transfer, assign, convey, and deliver to said Frieberg, Klein & Co. all of our accounts mentioned on attached sheet marked A, being against parties that are indebted to us at this time; and we do hereby authorize the said Freiberg, Klein & Co. to use our name, if necessary, in collecting said claims. We also transfer to Freiberg, Klein & Co., as a balance on above consideration, the notes now held by Freiberg, Klein & Co. as collateral security, besides the notes this day handed Mr. Sam. Klein in person, which notes, together with the aforementioned accounts, *the* amount in the aggregate [to] estimated value of fifteen thousand dollars.

"(Signed) STRAUSS & LEVY.
"ALBERT STRAUSS & J. J. LEVY."

Attached to this assignment was an exhibit giving a list of the notes and accounts assigned. This Exhibit A has been lost from

the papers and cannot be copied. It had two sets of figures, one in black and the other in red ink. The aggregate amount is not remembered. It purports to be the same from which Seinsheimer's exhibit attached to depositions was made up. Witness further said August Cohn is a friend of mine; lives near me and is solvent. I endorsed the $800.00 note given by him to Marx & Kempner as an act of accommodation.

36

3. And, to further maintain the issues on their part, the garnishees offered in evidence the pleadings and judgment of the court in the case of Oliver & Griggs *vs.* Strauss & Levy, Hoffheimer Bros., intervenors. This was an attachment suit by Oliver & Griggs; Hoffheimer Bros. intervened therein, charging collusion and fraud between the plaintiffs and defendants and denying the debt sued on. The depositions of Marx, Edmondson, and Kempner were taken in the case of Oliver & Griggs against Strauss & Levy, and were read in evidence on the trial of Oliver & Griggs against Strauss & Levy, and by consent were used in this case. In March, 1886, a trial was had in this court, to which the cause had been removed by Oliver & Griggs, and resulted in a judgment for Oliver & Griggs for their debt and foreclosure of their attachment lien and against the intervenors for the costs.

5. And, to further maintain the issues on their part, the garnishees read from the depositions of Paschal Tucker, as follows: "I cannot state the amount due each creditor of Strauss & Levy, but recollect some of the principal ones. At the time I lived in Dallas, and previous to their being attached I cannot state at what time such entries, showing the indebtedness of Strauss & Levy to Freiberg, Klein & Co., were made by me. I think the amount due Frieberg, Klein & Co. was between $15,000.00 and $20,000.00. The books of Strauss & Levy show the exact condition of the account. Most of the amount was for money loaned by Frieberg, Klein & Co. to Strauss & Levy and the balance was for goods sold to them. Strauss & Levy were indebted to Crawford & Crawford some five or six thousand dollars for money loaned them. I do not recollect the exact amount due Oliver & Griggs; think it was $5,000.00; do not recollect dates. There was no entries as to the firm owing Addie Lowenstein up to the time I left Dallas, August 7, 1885." Witness was the book-keeper for the firm up to August 7, '85.

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6. And, to further maintain the issues on their part, garnishees recalled Sam. Klein as a witness, who stated that many debtors of Strauss & Levy, whose debts had been assigned to them, were insolvent. The reasonable cash value of the accounts uncollected, after deducting $5,000.00, which is a total loss, would be 35 cents on the dollar—say $1,500.00 to $2,000.00.

Upon cross-examination the witness was shown the Exhibit A, attached to the assignment. This paper was stained with red ink and blue, and had two sets of figures—one in black and one in red. The black-ink figures were the ones made at the time of its execution, and the read ones [were] made since; they comprise all the claims. One S. A. Watts, upon whom there is a claim for more than $2,000.00,

is now insolvent; we took a house and lot in Alexander, Texas, from him in full settlement; we have it yet; it is worth about
38 $500.00; we have not put it down in the list of amounts received on the claims and accounts; do not know why. Seinsheimer attends to these matters at [the] Galveston office.

7. And, to further maintain the issues on their part, garnishees offered Joseph Seinsheimer as a witness. He said: I am a member of the firm of Freiberg, Klein & Co., and live in Galveston, Texas. On August 10, '85, Strauss & Levy owed us $15,789.79. When Strauss bought an interest in the firm of J. J. Levy & Co. that firm owed us $14,432.16. We took thirteen notes of Strauss & Levy for $1,000.00 each, due in rotation 30 days apart, and J. J. Levy's individual note for $1,432.16. These notes were discounted in Cincinnati. I have them here. (They were shown to the jury.) I have here the drafts and express receipts for the money which we advanced to the firm of Strauss & Levy in 1885. (They were read in evidence to the jury, and are as follows:) The receipts of the "Texas Express Co." for $6,000.00, sent by Freiberg, Klein & Co. to Strauss & Levy, dated Feb'ry 16, 1885. It is on a blank of the express Co., and shows the receipt of one package, said to contain $6,000.00, by Freiberg, Klein & Co. to Strauss & Levy, Dallas, Texas. The following are the drafts for the money paid Strauss & Levy, and for which they executed to us their notes, as well as a note for the $6,000.00, sent by express:

"$573.22. OFFICE OF STRAUSS & LEVY,
"DALLAS, TEXAS, *Feb'ry* 10, 1885.

"At sight pay to the order of ourselves five hundred and seventy-three & $\frac{22}{100}$ dollars, with interest from —— until paid, at
39 —— per annum, and charge on Dallas, Texas, value received, and exchange to account of—

"No. 1789. STRAUSS & LEVY.

"To Mess. Freiberg, Klein & Co., Galveston Tex."

Endorsed on the back as follows: "Pay to Marx and Kempner, or order. Strauss & Levy. Paid by Freiberg, Klein & Co. Marx & Kempner."

"$650.00. DALLAS, *M'ch* 2*d*, 1885.

"At sight pay to the order of I. Reinhardt, ag't, six hundred and fifty $\frac{00}{100}$ dollars, value received, and charge to account of—

"No. —. SAM. KLEIN.

"To Freiberg, Klein & Co., Galveston."

Endorsed as follows: "I. Reinhardt. 11107. Ball, Hutchins & Co. Oliver & Griggs. (Stamped:) Ball, Hutchins & Co. Mar. 4. Paid."

"$600.00. DALLAS, *M'ch 6th*, 1885.

"At sight pay to the order of Strauss & Levy six hundred dollars, value received and, charge to account of—

"No. —. SAM. KLEIN.

"To Freiberg, Klein & Co., Galveston."

Endorsed on back as follows: "Oliver & Griggs. For deposit to credit of Strauss & Levy. 11203. N. B. Sligh, cash'r."

"$1,100.00. OFFICE OF STRAUSS & LEVY,
"DALLAS, TEXAS, *March* 17, 1885

"At sight pay to the order of ourselves eleven hundred
40 dollars, value received, and charge to account of—

"No. 1813. STRAUSS & LEVY.

"To Mess. Freiberg, Klein & Co., Galveston, Tex."

Endorsed on back as follows: "Oliver & Griggs. For deposit to credit of Strauss & Levy. 11371. N. B. Sligh, cas."

"Frieberg, Klein & Co., liquors & cigars.

"$1,000.00. GALVESTON, TEXAS, *Ap'l* 2, 1885.

"Pay to the order of I. Reinhardt, ag't, one thousand dollars.

"No. 1575. FRIEBERG, KLEIN & CO.

"To Irving National Bank, New York."

Endorsed on back as follows: "I. Reinhardt, ag't. Jas. M. Donald, cas. Oliver & Griggs. (Stamped:) Oliver & Griggs. No. 11719. Dallas, Texas. Hanover National Bank. Paid Ap'l 7, 1885. New York."

"500.00. OFFICE OF STRAUSS & LEVY,
"DALLAS, TEXAS, *Ap'l 9th*, 1885.

"At sight pay to the order of ourselves five hundred dollars, and charge to account of—

"No. 1823. STRAUSS & LEVY.

"To Mess. Frieberg, Klein & Co., Galveston, Tex."

Endorsed as follows on back: "For deposit acct. Strauss & Levy. Oliver & Griggs. Ball, Hutchings & Co. On order for collection. (Stamped:) Oliver & Griggs. No. 11828. Dallas, Texas. Ball, Hutchings & Co. Ap'l 11th. Paid."

41 "$574.70. OFFICE OF STRAUSS & LEVY,
"DALLAS, TEXAS, *May* 7, 1885.

"At sight pay to the order of Marx & Kempner five hundred seventy-four & $\frac{70}{100}$ dollars, with interest from — until paid, at —, value received, and charge to account of—

"No. 1841. STRAUSS & LEVY.

"To Mess. Freiberg, Klein & Co., Galveston, Tex."

No endorsements. Stamped on face: "Paid March 8, 1885. Marx & Kempner."

"$1,500.00. OFFICE OF STRAUSS & LEVY,
"DALLAS, TEXAS, *June* 19*th*, 1885.

"At sight pay to the order of ourselves fifteen hundred dollars, value received, and charge to account of—
"No. 1866. STRAUSS & LEVY.

"Mess. Frieberg, Klein & Co., Galveston, Tex."

Endorsed on back as follows: "Ball, Hutchings & Co. Oliver & Griggs. (Stamped:) For deposit to credit of Strauss & Levy. Oliver & Griggs. 30087. Dallas, Texas. Ball, Hutchings & Co. June 22. Paid."

"$1,500.00. OFFICE OF STRAUSS & LEVY,
"DALLAS, TEXAS, *June* 22, 1885.

"At sight pay to the order of ourselves fifteen hundred dollars, value received, and charge to account of—
"No. 1867. STRAUSS & LEVY.

"To Mess. Frieberg, Klein & Co., Galveston, Texas."

42 Endorsed on back as follows: "Oliver & Griggs, Dallas, Texas. Ball, Hutchings & Co. (Stamped:) For deposit to credit of Strauss & Levy. Oliver & Griggs. 30092. Dallas, Texas. Ball, Hutchings & Co. June 27. Paid."

The following statement from the books of Freiberg, Klein & Co. was also read in evidence:

"Folio —. GALVESTON, TEX., *Oct.* 14, 1885.

M. Strauss & Levy in account with Freiberg, Klein & Co.

Memo. of Notes and Interest.

1885.			Principal.	Int. to Aug. 10th.
	To merchandise:			
Feb'y 12.	Note at	1 day	573 22	34 19
13.	"	"	1,650	97 90
16.	"	"	6,000	350
M'ch 6.	"	"	600	31 40
14.	"	"	1,100	54 63
Feb'y 16.	"	60 "	1,094 42	40 84
May 8.	"	1 "	574 70	17 98
June 20.	"	"	1,500	25 50
23.	"	"	1,500	24
Ap'l 11.	"	90 "	515 50	4 81
			$15,107 84	$681 25

E. & O. E."

The witness said that the statement was made from our books and shows the amount due us by Strauss & Levy. Witness further said that for the amounts mentioned in the above drafts and for the

It is not contested that about or on the 10th of August, 1885, the garnishees received from Strauss & Levy, who were then in failing circumstances, a large amount of bills receivable (notes and book accounts), and have realized on the same, net, something near $10,000.00, exact amount being shown by garnishees' answers to interrogatories given you in evidence, and have still on hand of said bills uncollected an amount shown by the proof, the value of which you can find from the proof. There is no substantial contest as to the fact that at the time the garnishees received these bills receivable from Strauss & Levy they (S. & L.) were in failing circumstances and unable to satisfy the claims of all of their creditors. Whether
51 this fact was known to the garnishees or to Sam. Klein, one of the garnishees, you will determine from the proof.

The garnishees claim that they were creditors of Strauss & Levy to the amount of near $16,000.00, and that in good faith, and with the sole and lawful purpose of obtaining satisfaction of their debt, they took from Strauss & Levy in satisfaction thereof the bills receivable aforesaid, which were not of greater value than their said debt, but were in fact of less value.

A failing debtor has the right to pay one creditor in full, though he may not be able to pay others anything, and a *bona-fide* creditor of a failing debtor may receive satisfaction of his debt in the transfer of bills receivable as well as in money, but is required to exercise the utmost good faith in such transaction, and to take no more in value than is reasonably adequate to pay his debt, and to so deal with said failing debtor as only to obtain satisfaction in good faith of his own debt, and not use his own debt, however honest it may be, as a shield to said debtor or an impediment to other creditors in reaching other assets of said failing debtor.

If, then, you believe from the proof in this case that the plaintiffs have a valid, subsisting, unsatisfied judgment against Strauss & Levy for something over eleven thousand dollars, or the amount claimed by them, and that Strauss & Levy were insolvent on the 10th day of August, 1885, and that the fact of said insolvency was then known to Sam. Klein, or such facts with reference to them were then known to him as would have prompted a reasonable and fair-minded man to make enquiry with reference thereto, and that such en-
52 quiry would have resulted in a knowledge of said fact, and that under these circumstances said Sam. Klein, on behalf of the garnishees, took the bills receivable aforesaid, and that the garnishees have received, and for the purposes of this litigation now have, of the proceeds of said bills receivable the sum of near ten thousand dollars (exact sum is shown by the proof as said above), and have still uncollected bills of value, you will find the garnishees liable to the plaintiffs in the amount so collected and the value found by you of the bills uncollected found by you—that is, return a verdict for the plaintiffs for the amount so shown by the proof to have been received by said garnishees and the value of the uncollected bills, if the sum of these do not exceed plaintiffs' debt, unless you believe from the proof that the garnishees were in fact and in good faith creditors of Strauss & Levy in the full sum claimed by said

garnishees, and that in the dealings of Sam. Klein, on behalf of the garnishees, with Strauss & Levy on the 10th of August, by which he obtained said bills receivable and cancelled the garnishees' claim against Strauss & Levy were in fact fair and honest and had with the single purpose of obtaining satisfaction of said debt, and that he received no more therefor than was reasonably worth the amount of said garnishees' said debt.

If the proof does so satisfy you of the honest fairness of garnishees' claim against Strauss & Levy and of the honest fairness of Sam. Klein's dealings with them on the 10th of August, 1885,
53 and that he received no more from them than was reasonably sufficient to satisfy the garnishees' demand, you will find for the garnishees.

Any subsequent conduct of Sam. Klein in reference to the demands of other creditors cannot affect his dealings with Strauss & Levy further than as circumstances which it is proper for you to consider in determining whether said Sam. Klein in his dealings on the 10th of August, 1885, with Strauss & Levy was acting in perfect good faith and with the sole purpose of obtaining satisfaction of an honest debt due the garnishees, as they claim.

(Signed) A. P. McCORMICK, *Judge.*

And the garnishees then and there excepted to the charge of the court for the following reasons:

1. It authorizes and permits the jury to find a verdict for the plaintiffs for an amount in excess of the amount shown to have been collected and received by garnishees at the date of the filing of the affidavit contesting the garnishees' answer.

2. It permits and instructs the jury that if they find for the plaintiffs to find the value of the notes and accounts received by the garnishees from Strauss & Levy which are still uncollected in their hands.

3. Said charge imposes upon the garnishees the burden of proving that the whole of the claim against Strauss & Levy was *bona fide*, and that the transaction on the 10th day of August, 1885, by which they received the notes and accounts in satisfaction of their
54 debt was in all things fair and honest.

4. It imposes upon the garnishees the burden of proving the correctness of their answer.

5. Because said charge authorized and permitted the jury to consider the dealings had between Klein and Strauss & Levy, subsequent to the 10th day of August, 1885, in determining the validity of their said debt.

6. Because under the statute laws of the State of Texas execution cannot issue against a garnishee for the value of property shown to be in his hands and liable to be taken in satisfaction of the plaintiffs' claim.

And, because the above evidences and exceptions do not appear on record, I, the judge who tried the above cause, for and at the request of the respective parties, hereunto set my hand and seal this the 19th day of June, 1886.

(Signed) A. P. McCORMICK, *Judge.*

Endorsed: No. 853. Hoffheimer Bros. *vs.* Frieberg, Klein & Co. Bill of exceptions. Filed June 19, 1886. A. J. Houston, clerk, by James D. Adams, deputy.

55 In the U. S. C. C. for the N. Dist. of Tex., at Dallas.

HOFFHEIMER BROS. *vs.* FRIEBERG, KLEIN & CO.

To the honorable judges of the circuit court of the United States for the northern district of Texas, at Dallas:

Sam. Klein and Joseph Seinsheimer, partners, composing the firm of Frieberg, Klein & Co., defendants in the above case, come now and pray your honors to allow them a writ of error to the Supreme Court of the United States, and for a reversal of the judgment rendered in the above-entitled cause against petitioners herein and in favor of Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer, composing the firm of Hoffheimer Bros., plaintiffs in this cause, and that your honors issue a citation commanding the said Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer to appear and and answer said writ of error in said Supreme Court on the second Monday in October, 1886, and that your honors fix the amount of and approve a supersedeas bond to be given by your petitioners for the prosecution of their said writ of error; and as in duty bound they will ever pray.

(Signed) WRIGHT, WRIGHT & ECKFORD,
CRAWFORD & CRAWFORD,
Att'ys for Petitioners.

Writ of error allowed by—
(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: No. 853. Hoffheimer Bros. *vs.* Frieberg, Klein & Co. Petition for writ of error. Filed June 19, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

56 FRIEBERG, KLEIN & CO. *vs.* HOFFHEIMER BROS.

Know all men by these presents that we, Frieberg, Klein & Co., a partnership composed of Sam. Klein and Joseph Seinsheimer, as principals, —— —— and —— ——, as sureties, are held and firmly bound unto Hoffheimer Bros., a partnership composed of Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer in the sum of sixteen thousand dollars ($16,000), to be paid to the said Hoffheimer Bros., their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and sever-ly, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this June —, 1886.

Whereas the above-named Frieberg, Klein & Co. have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of Hoffheimer Bros. *vs.* Frieberg, Klein & Co. in the circuit court of the United States for the northern

district of Texas, at Dallas, on June 10th, 1886, for the sum of eleven thousand three hundred and twenty-nine $\frac{79}{100}$ dollars ($11,329.79) and all costs of suit: Now, [the] condition of this obligation is such that if above-named Frieberg, Klein & Co. shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void;
57 otherwise the same shall be and remain in full force and virtue.

(Signed)	FRIEBERG, KLEIN & CO.	[SEAL.]
(Signed)	SAM. KLEIN.	[SEAL.]
(Signed)	JOSEPH SEINSHEIMER.	[SEAL.]
(Signed)	PAUL GLUCKSMANN.	[SEAL.]
(Signed)	PHILLIP SANGER.	[SEAL.]
	—— ——.	[SEAL.]
	—— ——.	[SEAL.]

Bond for the supersedeas in the within cause having been fixed by the court at the sum of sixteen thousand dollars, I hereby approve and order the within bond for said sum to be filed.

July 1st, 1886.

(Signed) A. P. McCORMICK,
U. S. Dist. Judge.

Endorsed: No. 853. Cir. court. Freiberg, Klein & Co. *vs.* Hoffheimer Bros. Writ of error and supersedeas bond. Filed July 1, 1886. A. J. Houston, clerk.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the northern district of Texas, Greeting:

Because in the records and proceedings and also in the rendition of a judgment of a plea which is in the said circuit court before you, between Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer, composing the firm of Hoffheimer Brothers, and Sam. Klein and Joseph Seinsheimer, composing the firm of Frieberg, Klein & Co., a manifest error hath happened, to the great damage of the said Sam. Klein and Joseph Seinsheimer, composing the said firm of Frieberg, Klein & Co., as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and all proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

59 Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court, this 19th day of June, A. D. 1886, and the seal of said circuit court, at Dallas, in the 110th year of the Independence of the United States.

[SEAL.] A. J. HOUSTON,
Clerk of the Circuit Court of the United States,
Northern District of Texas, at Dallas,
(Signed) By JAS. D. ADAMS, *Deputy.*

Writ of error allowed by—
(Signed) A. P. McCORMICK,
U. S. Dis't Judge.

(Endorsed:) No. 853. Freiberg, Klein & Co., plaintiffs in error, *vs.* Hoffheimer Bros., def'ts in error.

I hereby certify that this writ of error was lodged with me this day by plaintiffs in error for service upon defendants in error.
A. J. HOUSTON, *Clerk,*
By JAS. D. ADAMS, *Deputy.*

UNITED STATES OF AMERICA, *ss:*

To Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer, composing the firm of Hoffheimer Brothers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2d Monday in October next, pursuant to a writ of error
60 filed in the clerk's office of the circuit court of the United States for the northern district of Texas, wherein Sam. Klein and Joseph Seinsheimer, composing the firm of Frieberg, Klein & Co., are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this the 19th day of June, A. D. 1886.

(Signed) A. P. McCORMICK,
U. S. Dis't Judge.

Service of the within citation in error accepted this June 19, 1886.
(Signed) WATTS & WARD,
R. E. COWART,
SETH SHEPARD,
Att'ys for Hoffheimer Bros.

Endorsed: No. 853. Frieberg, Klein & Co., plaintiffs in error, *vs.* Hoffheimer Bros., def'ts in error. Citation in error. Filed June 19, 1886. A. J. Houston, clerk, by Jas. D. Adams, deputy.

61 I, A. J. Houston, clerk of the United States circuit court for the fifth circuit and northern district of Texas, at Dallas,

do hereby certify that [the] foregoing sixty pages contain a full, true, and correct transcript of the transcript from the district court of Dallas county, Texas, the judgment rendered June 10th, 1886, the motion for new trial, the motion in arrest of judgment, the order overruling said motion, the bills of exception, the petition for writ of error, the bond for writ of error, the writ of error, and the citation in error, as appears from the records and files in the case of Hoffheimer Brothers *vs.* Frieberg, Klein & Co., No. 853 on the docket of said court.

In testimony whereof I hereunto affix the seal of said court, at Dallas, and *and* the name of the clerk thereof, this 7th day of September, A. D. 1886.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk of said Court.

Endorsed on cover: N. Texas C. C. U. S. No. 1061. Sam. Klein and Joseph Seinsheimer, composing the firm of Frieberg, Klein and company, plaintiffs in error, *vs.* Solomon Hoffheimer, Max Hoffheimer, and Abraham Hoffheimer, composing the firm of Hoffheimer Brothers. Filed October 2, 1886.

Office Supreme Court U. S.
FILED
NOV 5 1889
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 112.

SAM. KLEIN AND JOSEPH SINSHEIMER, COMPRISING THE FIRM OF FREIBERG, KLEIN AND COMPANY, PLAINTIFFS IN ERROR,

vs.

SOLOMON HOFFHEIMER, MAX HOFFHEIMER, AND ABRAHAM HOFFHEIMER, COMPRISING THE FIRM OF HOFFHEIMER BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

M. F. MORRIS,
LEO N. LEVI,
For Plaintiffs in Error.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 112.

SAM. KLEIN AND JOSEPH SINSHEIMER, COMPRISING THE FIRM OF FREIBERG, KLEIN AND COMPANY, PLAINTIFFS IN ERROR,

vs.

SOLOMON HOFFHEIMER, MAX HOFFHEIMER, AND ABRAHAM HOFFHEIMER, COMPRISING THE FIRM OF HOFFHEIMER BROTHERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF CASE.

The proceedings for review in the present case arise under a writ of attachment or garnishment issued under the statutory law of the State of Texas. The plaintiffs in error are garnishees, and they complain of a judgment rendered

against them as such garnishees in favor of the defendants in error, plaintiffs below, when, as they claim, they were not indebted to the principal defendants in the suit, and had no assets of said principal defendants in their hands.

The suit was instituted on August 14, 1885, by Hoffheimer Brothers, the defendants in error here, against a firm of Strauss and Levy, of Dallas, in the State of Texas, to recover the sum of $11,787.15 due from the said firm of Strauss and Levy to Hoffheimer Brothers, and immediately upon the institution of the suit Strauss and Levy, having become insolvent, a writ of garnishment was taken out by Hoffheimer Brothers in the same suit and laid in the hands of the firm of Freiberg, Klein and Company as having in their hands assets of the insolvent firm of Strauss and Levy. Freiberg, Klein and Company pleaded to the writ, and denied that they were in any way indebted to Strauss and Levy, or had any assets of that firm in their hands (Rec., pp. 3, 4). To this answer the plaintiffs replied, alleging a fraudulent assignment by Strauss and Levy of all the book accounts, notes, and other choses in action belonging to them on August 10, 1885, to the garnishees, amounting in the aggregate to about $32,000, a large part of which, it was alleged, the firm of Freiberg, Klein and Company had collected.

Issue was joined between the plaintiffs and the garnishees, and upon trial before a jury, verdict and judgment were rendered in favor of the plaintiffs below and against the garnishees for the whole amount of the claim of the former, $11,787.15, judgment having previously been rendered against Strauss and Levy, the principal debtors (Rec., p. 11).

The facts of the case, as developed by the record, were these: Strauss and Levy had become heavily indebted to various persons and firms in different amounts, and, among others, to the firm of Freiberg, Klein and Company, the garnishees and plaintiffs in error here, in the sum of $15,789 (Rec., p. 19). Upon learning their embarrassment, and the

fact that Hoffheimer Brothers had made some threats to proceed against them, Sam. Klein, of the firm of Freiberg, Klein and Company, hastened to demand payment of the claim of the latter—amounting, as already stated, to $15,789—and succeeded in getting a settlement on August 10, 1885, by the assignment by Strauss and Levy of certain book accounts and promissory notes belonging to them to the firm of Freiberg, Klein and Company (Rec., p. 19). These book accounts were of the nominal value of $11,138.33, and the promissory notes of the nominal value of $11,751.79 (Rec., p. 15); but the actual value of all was estimated to be not more than $15,000 (Rec., pp. 19, 24). They did not include all the notes and book accounts of the embarrassed firm (Rec., p. 17), as claimed by the defendants in error in their replication (Rec., p. 5).

This occurred on August 10, 1885. On the following day, August 11, 1885, various suits were instituted against Strauss and Levy by their creditors, Crawford and Crawford, Oliver and Griggs, Marx and Kempner, Wertheim and Schiffer, and Addie Lowenstein; and writs of attachment thereon were issued, and all the stock in trade and assets of the insolvent firm were seized in pursuance of them, and subsequently sold. All these claims were reduced to judgments in due course of time.

Three days after these attachment suits—that is, on August 14, 1885—Hoffheimer Brothers instituted their suit against Strauss and Levy, and caused the writ of attachment to be served on Freiberg, Klein and Company, which constitutes the basis of the present proceedings. The suit was originally instituted in one of the State Courts; but was afterwards transferred, on petition, to the United States district court. The question in controversy was the validity of the assignment made on August 10, 1885, by Strauss and Levy to Freiberg, Klein and Company. Hoffheimer Brothers, the plaintiffs below, claimed that the assignment was in fraud of creditors. The garnishees, on the other hand,

a note endorsed by one August Cohn, whose endorsement, it is said, all parties had agreed to protect, and which was in fact protected by an endorsement by Freiberg, Klein and Company. (Rec., p. 13.)

3d. Testimony of Marx, of the firm of Marx and Kempner, as to the statements alleged to have been made by Strauss, Levy, and Klein, as above stated, on September 2, 1885; and also in reference to the arrangement for the protection of the Cohn endorsement. (Rec., p. 14.)

4th. Testimony of H. Kempner, of the same firm of Marx and Kempner, in reference to conversations alleged to have been had with Klein after the institution of the attachment suits—on the Sunday following, it is said, which was the 16th of August, in that year—in which Klein is stated to have given his reasons for arranging the attachment suits in the way in which he did arrange them.

5th. Testimony of one Chapman Bradford that some property, presumably some that had belonged to Strauss and Levy, had come into the possession of one Paschal Tucker. (Rec., p. 26.)

The court charged the jury substantially that they should find in favor of the plaintiffs, unless they were satisfied from the proof that the garnishees had acted in good faith; and that their dealings with the insolvent firm had been entirely fair and honest; and that the insolvent firm was indebted to them in the full sum claimed by them; and that they (the garnishees) had received from that firm no more than their debt was reasonably worth; and that they had acted with the sole and single purpose of obtaining satisfaction of that debt (Rec., pp. 28, 29); and it refused to instruct the jury, as requested by the garnishees, that the latter were entitled to stand upon their denial, and that the burden of proof

was upon the plaintiffs to show that the answer of the garnishees was untrue. (Rec., p. 27.)

For these rulings of the court in regard to the admission of testimony and for its charge to the jury and for its refusal to charge, as requested by the garnishees, errors are assigned.

II.

ASSIGNMENT OF ERRORS.

1. The court below erred in the admission of testimony as to declarations made by one of the assignors long after the assignment.

2. The court below erred in the admission of testimony as to other transactions unconnected with the assignment and irrelevant to the issues in this case.

3. The court below erred in the admission in evidence of a letter written by one of the assignors long after the assignment to a person having no connection therewith, and referring to a transaction irrelevant to the issues in this case.

4. The court below erred in its instruction to the jury that the plaintiffs were entitled to recover unless there was good faith on the part of the garnishees, and in placing the burden of proof on the garnishees to show such good faith.

5. The court below erred in its instruction to the jury that the plaintiffs were entitled to recover unless the principal defendants, Strauss and Levy, were indebted to the garnishees in the full sum claimed by the latter.

6. The court below erred in its instruction to the jury that the plaintiffs were entitled to recover unless it was shown by the proof that the garnishees had received no more for their debt than that debt was reasonably worth.

7. The court below erred in its instruction to the jury that the plaintiffs were entitled to recover unless it appeared from the proof that the garnishees had received the notes and book accounts assigned to them with the single purpose of obtaining satisfaction of their debt from the insolvent firm.

8. The court below erred in its instruction to the jury to give against the garnishees a verdict for the value of the uncollected assets in their hands that had been assigned to them.

9. The court below erred in its refusal or failure to instruct the jury to render a verdict for the garnishees.

10. The court below erred because its charge to the jury was inconsistent and calculated to mislead the jury.

III.

BRIEF OF ARGUMENT.

1.

The first, second, and third assignments of error are based upon the admission of improper and irrelevant testimony, and may be considered together.

A witness, Edmonston, put upon the stand by the plaintiffs, testified that on Sept. 2, 1885—twenty-three days after the assignment by Strauss and Levy to Freiberg, Klein and Company—the witness had a conversation with Strauss and Levy, in the presence of Klein and of Marx, of the firm of Marx and Kempner, in which Strauss and Levy stated how, on the night of August 10 and on the morning of August 11, 1885, Klein had arranged for the institution of the attachment suits which were instituted on the latter day and for the order in which they should be brought, and how

and why some change was made by Klein from the first arrangement in order to protect the indorsement, to which reference has already been made, of one August Cohn on a note of Strauss and Levy held by Marx and Kempner. The witness further testified that "Sam. Klein concurred in all that Strauss and Levy had said." To this testimony objection was made, but it was admitted notwithstanding the objection. (Rec., pp. 12, 13.)

In the next place, there was introduced in evidence, over the objection of the garnishees, a letter from Levy, of the insolvent firm, to Marx, of Marx and Kempner, under date of August 31, 1885, twenty-one days after the assignment to Freiberg, Klein and Company, in which there is a reference to some agreement by which "all parties concerned had agreed not to let A. Cohn suffer" on account of the indorsement by him already mentioned. (Rec., p. 13.)

Then M. Marx, of the firm of Marx and Kempner, was introduced as a witness. He corroborated the testimony of Edmonston as to the interview of the 2d of September, 1885, which has been stated, and he added that they had released Cohn from his indorsement by taking a new note signed by Cohn and indorsed by Freiberg, Klein and Company and by Strauss and Levy. This testimony was also admitted over the objection of the garnishees. (Rec., p. 14.)

Kempner, the other partner of the firm of Marx and Kempner, was then introduced, and testified that on the Sunday following the attachment suits—that is, on August 16, 1885—he had a conversation with Klein in Galveston, in which the latter gave his reasons for arranging the attachment suits as he did. Objection was also taken to this testimony as irrelevant. (Rec., p. 15.)

In rebuttal the plaintiffs introduced the testimony of Chapman Bradford, who testified to seeing some barrels of whisky marked "S. & L., Dallas," at the store of one Paschal Tucker, in Brownwood, Texas, in November, 1885. (Rec., p. 26.) This testimony, which was objected to by the gar-

nishees, apparently seems to have been introduced to contradict the statement of Klein, that none of Levy's goods had been shipped to Tucker (Rec., p. 18)—a wholly immaterial statement, whether true or false, brought out on cross-examination.

Much of this testimony is controverted or qualified by other testimony in the case, but whether it be true or false it is utterly inadmissible, and so plainly irrelevant to the issues in the case that it is difficult to conjecture upon what principle of law or rule of evidence it was admitted at all. It has reference exclusively to the attachment suits instituted in the name of various creditors of the insolvent firm of Strauss and Levy, other than the garnishees, on August 11, 1885, and to the part which Klein, one of the firm of Freiberg, Klein and Company, took in the institution and management of those suits, and it has no reference whatever, directly or indirectly, to the assignment of notes and accounts made on the previous day, August 10, 1885, by Strauss and Levy to Freiberg, Klein and Company, in satisfaction of the undisputed and indisputable claim of the latter. The two transactions were entirely separate and independent of each other, and no connection whatever is shown or even sought to be shown between them.

Alarmed by a demand made upon the insolvent firm in his presence on behalf of some creditor, Klein, with a vigilant eye to his own interests, immediately demanded and secured a settlement of the indebtedness of Strauss and Levy to Freiberg, Klein and Company. The settlement took the shape of an assignment by Strauss and Levy of certain choses in action, notes, and book accounts, assets of that firm of the estimated value of about $15,000, to Freiberg, Klein and Company, in consideration of the claim of the latter, amounting to $15,789. Having effected his settlement, Klein went home, and apparently dismissed the affairs of Strauss and Levy from his further consideration. This transaction occurred just after dinner on August 10, 1885. (Rec., p. 16.)

Late on the evening of the same day one Reinhardt, who was the brother-in-law of Klein, came with Strauss and Levy to Klein's house, called out Klein, showed him a telegram from the Hoffheimers of an alarming character, and Strauss and Levy consulted him and wanted to know what they should do about their affairs. Thereupon it was determined to anticipate action by the Hoffheimers, and during that night and the next morning (August 11, 1885) the arrangements were made and perfected for the institution of the attachment suits (Rec., pp. 16, 12) under which the stock in trade of Strauss and Levy was seized and sold and exhausted in the payment of the claims of the attaching creditors.

Now, apparently the inference sought to be drawn from this is that because Klein interested himself in the management of the attachment suits, therefore the previous assignment to his own firm of Freiberg, Klein and Company was fraudulent. This is the only theory upon which such testimony can be sustained; but plainly the inference is illogical and unreasonable. As we have already stated, there is no connection whatever shown between the two transactions. The assignment had been consummated before the attachment suits were even thought of. Testimony in regard to the latter is therefore irrelevant in regard to the former, and its admission was plain, palpable error for which the judgment should be reversed.

Again: Klein was properly the agent of his firm in the negotiation for the assignment made for the benefit of that firm, but his individual action in the subsequent attachment suits, even if it were improper, should not be charged against his firm, and yet that is what has here been done. The elementary principles of the law of partnership preclude any such conclusion.

But assuming for the present that the theory of the plaintiffs below, of combination, conspiracy, fraud, and collusion—for that seems to be their theory—was well founded in fact, it cannot be proved by any such testimony as that

which has been adduced in this case, and this Court has emphatically so decided in the case of *The Winchester and Partridge Manufacturing Company* vs. *Creary and Others* (116 U. S., 161), a case which also arose under the attachment laws of the State of Texas and in which the issues were almost identical with those in the present case. In that case, with reference to proof by declaration alleged to have been made by vendors after sale, the Court said:

"What they (the venders) might say, not under oath, to others, after possession was surrendered, as to the real nature of the sale, was wholly irrelevant. They were competent to testify under oath and subject to cross-examination as to any facts immediately connected with the sale of which they had knowledge; but their statements out of court, they not being parties to the issues to be tried, were mere hearsay. After the sale their interest in the property was gone. Having become strangers to the title, their admissions are no more binding on the vendee than the admissions of others. *It is against all principle that their declarations, made after they had parted with the title and surrendered possession, should be allowed to destroy the title of their vendee.*

"It is, however, insisted that Webb's (the vendor's) declarations after the sale are admissible in support of the charge of combination and conspiracy to defraud the defendants and other creditors. Without extending this opinion by a review of the adjudged cases in which there was proof of concert or collusion between vendor and vendee to defraud creditors, and in which subsequent declarations of the vendor were offered in evidence against the vendee to prove the true character of the sale, it is sufficient to say that such declarations are not admissible against the vendee, unless the alleged common purpose to defraud is first established by independent evidence, and unless they have such relation to the execution of that purpose that they fairly constitute a part of the *res gestæ*. There was no such independent evidence in this case, and there is no foundation for the charge of a conspiracy between the vendors and the vendee to hinder creditors, outside of certain statements which Webb (the vendor) is alleged to have made after his firm had parted with the title and surrendered possession."

All this is precisely in point in the present case. If the declarations of Strauss and Levy, alleged to have been made on September 2, 1885, have any value at all—and it is not apparent that they have any, except to confuse the jury—it is to discredit the assignment made by that firm to Freiberg, Klein and Company on August 10, 1885, and that is precisely the impropriety reprobated in the opinion of the Court just cited. There is no independent testimony of combination, conspiracy, collusion, or fraud, and they constitute no part of the *res gestæ*.

It is true that one of the witnesses who testified to these declarations testified also that "Sam. Klein concurred in all that Strauss and Levy said." But this does not remedy the impropriety or make the testimony more relevant. The declarations of Klein might have been important, but they are not proved by proof of the declarations of some one else, made even with his concurrence.

But what matters it even if there was combination, conspiracy, collusion, or a purpose to hinder or defraud certain creditors in this case? It was not a case of fraud or of a fraudulent sale. It is not contended, and could not successfully be contended, that Freiberg, Klein and Company did not have a *bona fide* claim of indebtedness against Strauss and Levy amounting to the sum of $15,789. And it is not contended, and could not successfully be contended, that, both under the law of the State of Texas and under the common law, they were not entitled to make arrangements with the insolvent firm that would give themselves a preference and secure them, even though thereby the assets of the insolvent firm should be exhausted and other creditors should receive nothing. Preferences, which are sanctioned by the common law, are also authorized by the law of Texas. Moreover, it is shown conclusively and beyond question that at the time of the trial the garnishees had not been fully paid the amount of their claim. They had received from the assets assigned to them only $12,165.41 gross, or

$9,800.42 net. There remained $5,989.58 due to them (Rec., p. 15); and the assets which they had wherewith to pay that sum were estimated to be worth not more than $3,850 (Rec., pp. 20, 24). There is no controversy in regard to these figures, and there should be no controversy over the law applicable to them.

Freiberg, Klein and Company had a *bona fide* claim of $15,789 against Strauss and Levy. They were entitled by law to obtain satisfaction of that claim by payment of the money, by assignment of assets, by transfer of property, or in any other of the usual modes for the settlement of claims, regardless of the ability or inability of Strauss and Levy to satisfy their other creditors, and, it may be added, regardless of the motives which may have inspired either party in making the settlement. Even if it was the deliberate purpose and intention of both parties to hinder or prevent the plaintiff below or any other creditor or creditors of Strauss and Levy from obtaining satisfaction of their just claims, such purpose or intention is of no consequence whatever in this connection so long as the claim of the garnishee is a just and valid claim, and so long, of course, as the assets assigned to them are not more than reasonably sufficient to pay that claim. There can be no fraud in law in procuring satisfaction of one's own just claim, though as to any excess of assets over and above such reasonable sufficiency the question of fraud may be presented. The statute of Elizabeth does not apply to this case; and such the law has specifically been held to be in the State of Texas as well as elsewhere. It is the law of Texas that it does not matter what a man's motive may be, if his action amounts to no more than he is legally entitled to do.

Greenleaf *vs.* Blums, 59 Texas, 126.
Valentine *vs.* Ellis, 65 Texas, 532.
Lewy *vs.* Fischl, 65 Texas, 311.
Bunn *vs.* Ahl, 29 Pa. St., 390.
Rice *vs.* Perry, 61 Me., 149.
Horwitz *vs.* Ellinger, 31 Md., 492, 504.

2.

There seems to be no justification whatever for the admission of the letter of Levy to Marx, dated August 31, 1885 (Rec., p. 13), or for the testimony of Chapman Bradford in regard to the possession by one Tucker, in November, 1885, of property supposed to have belonged to Strauss and Levy (Rec., p. 26).

The last-mentioned testimony is so grossly irrelevant that its admission alone should be sufficient to vitiate the judgment. Klein had been asked on cross-examination whether he knew one Paschal Tucker, and whether any of the goods of Strauss and Levy had ever been shipped to him or received by him. His answer was that he knew Tucker; that Tucker had been book-keeper for Strauss and Levy; that at the time of the trial he was keeping store at Brownwood, and that none of the goods of Strauss and Levy had ever been shipped to him or received by him (Rec., pp. 17, 18). These questions, however proper they may have been in cross-examination, either to test the credit of the witness or for any other purpose, plainly have no relevancy to the issue, and it was therefore improper to adduce or to admit testimony, the only object of which was or could have been to contradict the answers of the witness to them. This is all that is apparently sought to be accomplished by the testimony of Chapman Bradford (Rec., pp. 25, 26), when he says, in rebuttal, that in November, 1885, he saw in Tucker's store at Brownwood several barrels of whiskey marked "S. & L., Dallas." It is not shown that "S. & L." meant "Strauss and Levy." It is not shown that Tucker may not have received the goods in many other ways than by shipment from Strauss and Levy in the several months intervening between the middle of August and November. In brief, this testimony is so utterly irrelevant and improper for any purpose that it would be a waste of time to discuss it.

3.

The fourth, fifth, sixth, and seventh assignments of error may be considered together. They are based upon the instructions to the jury contained in the charge of the court. These instructions were substantially to the effect that the plaintiffs below were entitled to recover, unless the proof in the case showed that the garnishees were in good faith creditors of the insolvent firm to the full amount claimed by them, and that the dealings of Klein, on behalf of the garnishees, with the insolvent firm on the 10th of August, 1885, were in fact fair and honest and had with the single purpose of obtaining satisfaction of their claim; and that he received no more therefor than was reasonably worth the amount of the claim of the garnishees. Now, these instructions are not a correct statement of the law applicable to the case; and they are erroneous for several reasons.

1st. They place upon the garnishees, who were defendants in the suit, the burden of proving that they were the owners in good faith of certain assets that had been assigned to them, of which they were in possession, and which they claimed to own. The plaintiffs below attacked their ownership and denied their right of possession. Now, under the most elementary principles of law, it was incumbent upon the plaintiffs under this condition of things, to prove their case, to prove that the possession of the garnishees was illegal and their title invalid, to prove all the facts necessary to constitute fraud and illegality on the part of the garnishees. The charge, on the contrary, imposes on the garnishees the burden of proof that their possession was fair and honest, when the law already presumes it to be such and makes no such requirement of them. It was incumbent on the plaintiffs to show that the garnishees had acted in bad faith, not upon the garnishees that they had acted in good faith. It was incum-

bent on the plaintiffs to show that the garnishees had received more than their claim was reasonably worth, not upon the garnishees to show that they had not received more than they were reasonably entitled to receive. The well-established rules of evidence have been reversed in this case.

The radical error of the court was in disregarding the pleadings. The garnishees, in their plea or answer to the suit of the plaintiffs, had denied all liability in the premises. They were entitled to the benefit of that denial, and the court refused to give it to them, and refused to instruct the jury to take it into consideration.

2d. These instructions given by the court imposed improper restrictions upon the garnishees. They directed a verdict in favor of the plaintiffs, unless it appeared from the proof that the indebtedness of the insolvent firm to the garnishees amounted to the full sum claimed by the latter; in other words, the whole claim of the garnishees was to be confiscated in favor of the plaintiffs if it fell one dollar short on proof. This is a most extraordinary ruling, unjustified by any rule of law or any principle of equity; and it is all the more extraordinary inasmuch as there was no testimony whatever to impugn the validity of the claim of the garnishees or to vary its amount in the slightest degree.

The jury was also directed to render a verdict for the plaintiffs, unless it appeared from the proofs that the dealings of Klein with the insolvent firm in procuring the bills and notes in question from it and in cancelling therefor the claim of the garnishees against it were had with the single purpose of obtaining satisfaction for the claim. This is not law. The law cannot scan the motives of men so long as their actions are such as are recognized as legal. It is true that by the statute of Elizabeth conveyances that otherwise would be right and proper are made illegal if made to

hinder, defraud, or delay creditors, and the motives of parties are in that instance of importance; but it has always and invariably been held that in the absence of bankrupt or insolvent laws conveyances for the purpose of obtaining satisfaction of a prior existing indebtedness are not covered by this statute, and it does not matter that there may have been sinister and improper motives in the transaction if, as a matter of fact, the transaction practically amounted to no more than the settlement of a previous indebtedness. Authorities to this effect have already been cited.

Then, in the next place, it is made a condition that the garnishees should show that they had received no more from the insolvent firm than was reasonably worth the amount of the debt due to the garnishees. The uncontroverted proof in the case was that the amount received by the garnishees would fall short of satisfying their just claim. There was no ground, therefore, for remitting this point to the arbitrament of the jury, nor was there any proof whatever, except that given by Klein himself or the other garnishees, to show the value of the assets assigned, and hence there was no question for the jury to pass upon; and again, even supposing that there was any such proof or that the question was one proper for the jury to pass upon, the effect of the instruction is, as in the former case, to confiscate the whole and entire claim of the garnishees if it appeared from the proof, or rather unless the garnishees showed that they had not received the value of one dollar more than they were entitled to receive.

A radical vice running through all these instructions is that in the contingencies specified the whole claim of the garnishees is confiscated, instead of their being required, as might possibly be proper, to pay over any excess that they might have in their hands after the satisfaction of that claim.

4.

The instructions of the court were also erroneous, because they authorized a verdict against the garnishees for the value of the uncollected assets in their hands, and upon this point the eighth assignment of error is based.

Assets of the nominal value of $22,890.12 had been assigned. (Rec., p. 15.) This is not controverted; it is the testimony offered by the plaintiffs themselves. On account of them $12,165.41 gross or $9,800.42 net had been collected. (Rec., p. 15.) This also is the showing of the plaintiffs themselves. The residue of the assets, which remained uncollected and were of the nominal value of $10,724.72, supposing that those collected had all realized dollar for dollar, which is the most favorable supposition for the plaintiff, although it does not appear what the fact was in this regard. Now, this residue, it is testified—and the testimony is wholly uncontroverted, and it is the only testimony on the subject—was not worth more than thirty-five (35) cents on the dollar, or $3,753.65. (Rec., pp. 20, 24.)

The whole of this, as already stated, was not sufficient to pay the claim of the garnishees, which was $15,789. The net amount collected ($9,800.42), even if the claim of the garnishees were wholly to be disregarded, was not sufficient to warrant a judgment against the garnishees for the amount of the plaintiffs' claim ($11,787.15), unless the value of the uncollected assets was taken into consideration. But the court directed the jury to take this into consideration, and accordingly to give a verdict against the garnishees for the whole amount of the plaintiffs' claim, which the jury accordingly proceeded to do. This, it is submitted, was error.

The garnishees claimed these assets as their own; and if their claim was just, they were their own. But if their claim of ownership was illegal as against the plaintiffs, they had not converted these assets to their own use, and they could

not justly be held for their value until they had so converted them. The plaintiffs were not, in any aspect of the case, the owners of these assets. At most, they could only have a lien upon them of an equitable character, to be enforced by law. They could not have maintained trover. They could not have directly maintained any action to recover them from the garnishees. The garnishees were lawfully in possession as to the previous owners and as to all the world, except creditors injured by the transaction, and as to these they could only be held as trustees and by some equitable proceeding, or possibly they might be held in assumpsit, which is an equitable proceeding, if they had converted the assets and held the proceeds.

The Revised Statutes of the State of Texas contain the following provisions in regard to garnishments:

Art. 205. Should it appear from the answer of the garnishee, made in either of the modes provided for in this chapter, or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against the garnishee for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of the plaintiff's judgment against the defendant, with interest and costs, in which case it shall be for the amount of such judgment, interest, and costs.

Art. 206. Should it appear from the garnishee's answer or otherwise that the garnishee has in his possession, or had when the writ was served, any effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff, or any constable presenting an execution in favor of the plaintiff against the defendant, such effects or such of them as may be necessary to satisfy such execution.

Art. 207. Should the garnishee be adjudged to have effects of the defendant in his possession as provided in the preceding article, and fail or refuse to deliver them to the sheriff or constable on such demand, the officer shall immediately make return of such failure or refusal; whereupon, on motion of the plaintiff, the garnishee shall be cited to show cause at the next term of the court why he should not be attached for contempt of court for such failure or refusal; and should the garnishee fail to show some good and sufficient excuse for such failure or refusal, he shall be fined for such contempt and imprisoned until he shall deliver such effects.

The assets in question in this case are mere choses in action, which, by the common law everywhere, in the absence of statute, are not subject to execution. They are not, therefore, subject to garnishment; and so it has been held in Texas as well as generally elsewhere.

Price *vs.* Brady, 21 Texas, 614.
Taylor *vs.* Gillean, 23 Texas, 514.
Tirrell *vs.* Canada, 25 Texas, 455.
Ellison *vs.* Tuttle, 26 Texas, 283.
Van Ness *vs.* Hyatt, 13 Peter, 294.
Drake on Attachment, sec. 463, and cases there cited.

If these assets, therefore, are not subject to attachment, the instruction of the court that the jury might find for the plaintiffs for the value of them was absolutely wrong. If, on the other hand, they were subject to attachment, it could only be as "effects of the defendants" in the hands of the garnishees; and articles 206 and 207, above cited, would govern the case; and these articles require a decree to be rendered for the surrender of them, and do not authorize a judgment for their value. By providing for the decree they necessarily prohibit the judgment. Under any aspect, therefore, of the case the instruction was wrong.

5.

The instruction of the court that in estimating the fairness of Klein's conduct with Strauss and Levy on August 10, 1885, the jury might consider the subsequent conduct of Klein in reference to the demands of other creditors of Strauss and Levy is plainly erroneous. There is not the slightest particle of testimony to show any connection whatever between the attachment suits of August 11, 1885, and the assignment of the previous day to Freiberg, Klein and Company. The latter transaction was consummated and at an end before the attachment suits were even thought of; but even apart from this the instruction was unjustifiable so far as it seeks to determine the good faith of one transaction by the conduct of one of the parties in another and a different transaction.

It is true that, in actions for fraud, where the intention is important, other similar frauds committed about the same time by the defendant may be given in evidence; but, besides the fact that intention is of no consequence here, as we have attempted to show, and the further fact, which is apparent, that in the matter of the assignment Klein acted for his firm and in the attachment suits he acted on his individual account, and that therefore his action in the latter case, whether right or wrong, should not be held to affect the rights of his firm in the transaction in which he was authorized to act for the firm, it is certainly not competent to prove fraud in one transaction by the evidence of other transactions of an entirely different character, and not themselves shown to be fraudulent. For, after all, it does not appear that there was any fraud whatever in the attachment suits, or that Klein did anything in them which he did not have a right to do.

6.

It is respectfully submitted that, for the plain and palpable errors manifested in this record, the judgment of the court below should be reversed.

M. F. MORRIS,
LEO N. LEVI,
For Plaintiffs in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 112.

SAM. KLEIN and JOSEPH SEINSHEIMER, Comprising the Firm of FREIBERG, KLEIN & COMPANY,

Plaintiffs in Error,

vs.

SOLOMON HOFFHEIMER, MAX HOFFHEIMER and ABRAHAM HOFFHEIMER, Comprising the Firm of HOFFHEIMER BROS.,

Defendants in Error.

In Error to the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR DEFENDANTS IN ERROR.

GEORGE HOADLY,

Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1889.

SAM. KLEIN and JOSEPH SEINSHEIMER, comprising the firm of Freiberg, Klein & Company,
Plaintiffs in Error,

vs.

SOLOMON HOFFHEIMER, MAX HOFFHEIMER and ABRAHAM HOFFHEIMER, comprising the firm of Hoffheimer Brothers,
Defendants in Error.

No. 112.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

Brief of George Hoadly, of Counsel for Defendants in Error.

The errors assigned in this case may be divided into classes, namely :

FIRST. To the admission of testimony.
SECONDLY. To the charge of the Court.
THIRDLY. To the amount of the verdict.

Hoffheimer Brothers are judgment-creditors of Strauss & Levy. In the action where they recovered judgment, Sam'l Klein and Joseph Seinsheimer, as partners under the firm name of Freiberg, Klein & Company, and also individually, were garnisheed as debtors and in possession of property of Strauss & Levy.

The principal cause was originally brought in the District Court of Dallas County, was subsequently removed, and with it the garnishment, Hoffheimer Brothers being residents of Ohio, to the Circuit Court of the United States for the Northern District of Texas.

The plaintiff's recovery against Strauss & Levy was the sum of $11,787.15 on May 22d, 1886.

The issue between the garnishees and the plaintiffs were made by answers of the garnishees (Record, fol. 5):

"That they are not now indebted to Strauss and Levy, or either of them, and were not indebted to Strauss and Levy, or either of them, when this writ was served; that they have no effects of Strauss and Levy, or either of them, in their possession, and had none when this writ was served."

To these answers the plaintiffs filed a reply controverting the same and charging that (Record, fols. 7–8):

"August 10, 1885, prior to the issuance and service of said writs of garnishment, that said garnishees combined, colluded, and confederated together with said Strauss & Levy, for the purpose and with the intent to hinder, delay and defeat the creditors of said Strauss & Levy in the collection of their debts, and that in furtherance of said combination, at said time and with the intent aforesaid, said garnishees secretly and covinously procured and received from said Strauss & Levy all the books, accounts, notes, choses in action and other evidences of indebtedness then owing to said Strauss & Levy by divers and sundry persons to these

plaintiffs unknown, but amounting in the aggregate to about the sum of thirty-two thousand dollars, and that said garnishees thereafter immediately commenced to collect said claim, pretending to be the owners thereof. * * * They are informed and believe that at the time the writs of garnishment were served, as well as at the time said answers were filed, that said garnishees had then collected a very large amount upon said claims, * * * whereupon these plaintiffs say that they have good reason to believe and do believe that said garnishees did have in their possession effects belonging to said Strauss & Levy, both at the time said writs of garnishment were served upon them and at the time they filed said answers herein ; and also that they were indebted to said Strauss & Levy at said time, and that therefore the answers of said garnishees are incorrect in the particulars herein stated."

The issue thus made was submitted to a jury on June 10, 1886, who found for the plaintiffs that they recover from the garnishees the sum of $11,329.79, for which sum judgment was thereupon rendered, with the order that (fol. 11) :

" when the above amount or any part thereof is collected by or paid to said plaintiffs, it shall constitute a credit to the amount so collected or paid,"

on the plaintiff's judgment against Strauss and Levy.

I.

Objections to Testimony.

The testimony objected to, in order to justify reversal, must be shown to have been incompetent or irrelevant, and prejudicial.

This testimony may have been incompetent or irrelevant, yet, unless prejudicial, it did not injure the plaintiffs in error. If competent, but irrelevant, it is not easy to see how it could have injured them.

Chandler vs. Von Roeder, 24 How., 224.
Gregg vs. Moss, 14 Wall., 564.
Cooper vs. Coates, 21 Wall., 105.
Cannon vs. Pratt, 99 U. S., 619.
Mining Company vs. Taylor, 100 U. S., 37.

The same rule is adopted in the State practice. It is thus laid down in the syllabus of *Loder vs. Whelpley*, 111 N. Y., 239.

"Where, however, testimony so prohibited has been improperly received by the Surrogate, it is not a sufficient ground for a reversal of his decree, 'unless it appears to the appellate Court that the exceptant was necessarily prejudiced thereby.' (Code of Civil Procedure, Section 2545), *i. e.*, to authorize a reversal, it must appear that without the improper evidence the respondent would not have succeeded."

With regard to the several items of testimony objected to, bearing in mind that the issue was whether the garnishees combined, colluded and confederated with Strauss and Levy to hinder, delay and defeat their creditors, we observe—

First. That the record does not profess to contain all the testimony given for either of the parties to the cause.

Secondly. That the testimony of the witnesses Edmondson, Marx and Kempner, the admission of which is claimed to constitute error, prove admissions of Klein establishing the conspiracy and fraud.

The testimony of Edmondson (folios. 21, 22), and Marx (folios. 24–25), consisted of the repetition of a conversation on September 2, 1885, with the defendant Klein, together with Strauss and Levy. All that was said by Strauss and Levy in these conversations was concurred in by Klein. This, the witnesses testify, and, therefore, the testimony consists of admissions of one of the present plaintiffs in error, a defendant in the original garnishment.

The testimony of Kempner is of the same general character. It consists of a conversation with Klein in Galveston.

This testimony being in the nature of admissions by a party to the record, was strictly competent. The real objection, if any, therefore, must be that it was irrelevant. If it bore upon any issue in the cause, it could not be objected to on any ground, because it came from the highest source of authority, being the admission of a party against his interest.

The nature of this testimony will be better understood by a brief description of the character of the case.

On August 10, 1885, the defendant Klein, being in Dallas, Texas, in the store of Strauss and Levy, claims to have overheard a conversation between them and a lawyer by the name of Bradford, in which the latter claimed payment of a claim not then due. Klein says (folio 30), that he

> " knew that Bradford was the attorney for the Bradstreet Commercial Agency. I became alarmed and demanded payment of our debt. They said they did not have the money. I asked what else they had, and they replied notes and accounts, and they assigned them to us in payment of our debt."

Bradford testifies (folio 46), that so far from demanding payment of a note that was not due, he went into the store of Strauss & Levy to inquire about a note which had been due for about a month, and which Strauss & Levy satisfied him had been paid into bank, as to which upon inquiry by the witness at the bank, he found that a mistake had been made in not giving him credit. He also testifies that Klein was not within hearing distance.

In this way, the notes and accounts, collections of which constitute the fund garnisheed and recovered in this case, came into the nominal control and ownership of Klein, for himself and his partners.

Strauss & Levy also stated in the same conversation, Klein concurring, that Hoffheimer Brothers telegraphed the same day, August 10, in such a way as to alarm them. That they went with the telegram to Klein, and about one o'clock that night they went to the house of Crawford, one of their lawyers, and it was then agreed that their confidential debts, as they called them, should be secured by attachments, as follows, viz.: Debts due by Strauss & Levy to Crawford & Crawford, Marx & Kempner, Wertheim & Schiffer, Oliver & Griggs and Addie Lowenstein, respectively.

In getting up these attachments Klein was leader. This is shown by his admissions of Klein to Kempner, included in the objections now under consideration. Kempner says that he asked Klein this question (fol. 25):

"Now, Mr. Klein, being that you were the leader and manager of the attachment suits why is it that you did not carry out the instructions of Strauss and Levy, to put Marx and Kempner second in the order of attachment?"

Klein replied that he felt in honor bound to put in Oliver & Griggs ahead of Marx & Kempner, because he had recommended them for accommodation; that, as for the others, that was done by the attorneys. He said that he had done all that he could for Marx & Kempner; that Strauss had insisted that Addie Lowenstein should be put in as a creditor in attachment for $3,000, but he (Klein) objected, and it was compromised on the $1,000 named. She is the sister-in-law of Strauss. Klein admitted on the stand (fol. 33) that:

"Rhinehart came to my house at night on the 10th with Strauss & Levy. At their persuasion I went with them to Judge Crawford's. I went with them from there to Crawford's office. It was early in the morning. I went to sue out attachments for Marx & Kempner. I intended to make the affidavit for Marx & Kempner's attachment. My name was signed to that affidavit for attachment in the case of Marx & Kempner and Addie Lowenstein; do not remember what the ground of the attachments were."

The affidavits in the cases of Lowenstein and Marx and Kempner were then shown to Klein containing this clause:

"That the defendants Strauss & Levy have disposed of their property in whole or in part, for the purpose of defrauding their creditors."

It was then agreed by the parties (folio 33):

"That the attachment affidavits of Marx & Kempner and Addie Lowenstein were signed by Sam. Klein originally; that he intended to make the affidavits and went to the clerk's office for that purpose; that Judge Crawford hurried off to levy the first three attachments on the goods, and by mistake had these affidavits along with him; that Klein waited some time for his return, and finally, being sick, went home before Crawford returned, and other persons made the affidavits instead.

He signed the attachment bond of Lowenstein as surety and also of Oliver and Griggs."

As the only transaction to which these affidavits could have referred, as appears by the record, was the assignment during the previous daytime by Strauss & Levy to Klein, of the garnisheed property, it follows that, but for the accidents that Judge Crawford by mistake carried these affidavits to the court house in his pocket after they had been signed by Klein, and of Klein's sickness which compelled him to go home before Crawford's return, Klein would have been on record in Dallas County in the position of swearing that the transaction now in question was fraudulent.

The affidavit which he actually did sign contained the statement:

"That the defendants Strauss and Levy have disposed of their property, in whole or in part, for the purpose of defrauding their creditors."

This disposal thus admitted by Klein to have been fraudulent was in issue in this case. Klein not only signed the admission, but was ready to swear to it, and was only prevented from such verification by accident, and became surety upon two at least of the bonds necessary for attachment, by which the stock in trade of Strauss and Levy were confiscated for the benefit of the attaching creditors, viz.: Crawford & Crawford, Oliver & Griggs, Marx & Kempner, Wertheim & Schiffer and Addie Lowenstein, and finally bought by Klein. How can it be possible, under these circumstances, that the statement of Strauss and Levy, concurred in by Klein, made to Edmondson and to Marx, and the other statement of Klein to Kempner explaining these trans-

actions are either incompetent or irrelevant? These are all parts of one transaction in which the leader and principal actor, the Poo Bah of the whole proceeding, was Klein. He took the assignment of the notes and book accounts to his firm; he prescribed the order of the attachments, actually signed and was ready to verify the affidavits for attachment, went on the bonds, and then explained in the objected conversations the reason why matters were thus done, and why this shape and form of transaction had been adopted.

Part of the conversation between Edmondson and Marx of the one part, and Strauss, Levy and Klein of the other, consisted of explanations by Klein of the relations of one August Cohn to the claim of Marx & Kempner. Marx & Kempner held Strauss and Levy's note for $1,250, endorsed by August Cohn. Cohn was Levy's brother-in-law, and Levy was particularly angry that Klein had arranged that Oliver & Griggs' attachment should be levied ahead of Marx and Kempner's, which would have secured his brother-in-law from loss.

Levy insisted in the conversation (fol. 22; italics mine):

"that it was particularly understood when they attached that the August Cohn note should first be paid. He then demanded an indemnity from Marx for Cohn against said note, claiming that the goods attached were enough to recover that amount, and whatever became of the balance, that note must be paid and August Cohn not bothered. Levy said that he had taken legal advice and would knock all the attachments out of Court and give away how the whole thing was done, and let none of the confidential debts be paid—a dollar, rather than Cohn should suffer. Levy also said that Oliver & Griggs' attachment was not worth a cent, because he gave the note sued on by them after the attachment; that the note sued on was not in existence

when the suit was filed. * * * *Sam. Klein concurred in all that Strauss and Levy said.*"

These witnesses, Edmondson and Marx, also testified that this controversy between Marx and Kempner and Klein was finally settled by Strauss and Levy giving Marx and Kempner—

"a note of August Cohn for $800, endorsed by Freiberg, Klein & Co." (fol. 23).

It is manifest that Klein's part in the transaction is not divisible, as claimed by the learned counsel for plaintiffs in error. They cannot establish that Klein first took an assignment of the notes and accounts, and that this transaction having been closed, became the leader in a separate and independent transaction consisting of the issue of the attachments.

The notes and accounts were transferred on August 10th, "after dinner" (fol. 30). It was not until—

"Just after dinner that Bradford came into the office of Strauss & Levy, and it was not until Bradford came in that Klein became alarmed."

The Court will find on examination of the Record (fol. 45) that the assignment to plaintiffs in error was of accounts as described in a schedule. This schedule has been lost, but it appears to have had two sets of figures, one in black and the other in red ink. The loss of the schedule is itself a suspicious circumstance, but without delaying further to refer to this, our object will be attained by directing the Court's attention to the fact that much time must have elapsed from Bradford's visit until the completion of the execution of the

assignment of notes and accounts with this schedule. Klein says that, the same evening (fol. 30):

"Late on the night of the 10th, Mr. Rhinehardt came to my house and showed me a telegram and said that Strauss and Levy were outside and wanted to know what to do about their business matters. I told them to go and see Crawford & Crawford. At their solicitation I went with them to the residence of M. L. Crawford. After 1 o'clock A. M. on the 11th, immediately after seeing Crawford, he said that his papers were ready and he was going to attach. This was the first intimation I had that any attachment would be levied. We did not take the books at once. Strauss & Levy gave them to us because we could not sue on some of the claims without them."

According to this story the lawyer Crawford drew the affidavits in the Marx and Kempner and Lowenstein cases for Klein to swear to his own fraud, without instructions.

Further description of the transaction was given by Klein on cross-examination in these words (folio 31):

"I gave Strauss and Levy a receipt against the notes for the whole debt and took a written transfer of the notes and accounts on the afternoon of the 10th. A statement of the amount of each account was taken from the books, and each statement endorsed to us by writing thereon, 'for value received we transfer to Freiberg, Klein & Co.' Each note was so endorsed also. This was the case with all, except some in the hands of Dickson & Maroney for collection. I got them all that evening, and a few days after sent them to Galveston. I do not remember when I got the books. They were in the house on the 11th, when the attachments were made. I had a list of the notes and accounts transferred. It is either in our possession or Levy's."

It seems in the highest degree improbable that any considerable time elapsed, on the afternoon and night of the 10th of August, and the early morning of the

eleventh, during which Klein was not engaged in this business; that it was all one thing, an attempt to give himself and partner a preference by assignment of the notes and accounts, and to provide for his friends by attachments based on the ground of fraud practiced by Strauss and Levy; fraud which could have been none other than his own dealings during the afternoon of the same day in taking the notes and accounts; fraud which he was ready to swear to, and the averment of which he did actually sign. There are here elements of conspiracy—Hoffheimer Brothers, the absent creditors, unprovided for, their arrival and proceedings feared—the hour of midnight chosen for action. At the sale made by order of the District Court of Dallas County the stock of goods attached by the several creditors was bought in by Klein for $14,000. Klein swears that Paschal Tucker had been bookkeeper for Strauss and Levy; that he moved to Brownwood:

"I hear he is keeping his store there. I have never been in it. None of Strauss & Levy's goods were shipped to Tucker. He received none of them. I shipped them all to Freiberg, Klein & Co., at Galveston."

Bradford testifies that in November, 1885, he was in Paschal Tucker's store in Brownwood, and there saw several barrels of whiskey marked 'S. & L., Dallas' (folio 47).

Surely enough is shown, even by the imperfect statement of the evidence contained in the record, to leave to the jury, and to sustain the verdict when rendered, certainly enough, when the trial Judge, who saw the witnesses, approved the verdict by refusing a motion for a new trial, to lead now to the conclusion that the

averment of conspiracy made in the controverting reply is true. If true, all the transactions of the conspirators during its continuance became competent, provided they were in furtherance of the conspiracy.

SECONDLY. This brings us to the letter written by Levy to Marx (folio 23), the introduction of which was objected to. It is in these words (italics his):

"DALLAS, TEXAS, August 31, 1885.

M. MARX, Galveston, T'x:

DEAR SIR: When you were here on Saturday last you *have* told me that the $1,250 note you discounted for us on July 31 is all right. Strauss says that you have spoken to August Cohn to the contrary. Now, you well know that all parties concerned have agreed not to let A. Cohn suffer, nor shall he do so. When we attached for M. & K. the first consideration was the $1,250 note. There is enough here to cover that amount. I request you to let me know by return mail whether this is all O. K., and oblige,

Yours truly,
J. J. LEVY."

To the introduction of this letter the garnishees objected, on the ground that it was incompetent and irrelevant, and now stoutly maintain that it has no relation whatever to the transaction between Klein and Strauss and Levy, whereby Klein procured the assignment to his firm of notes and accounts. But the explanation already given must satisfy the Court that this letter is part of the same transaction. It was a step in the conspiracy, followed up on the second day of September, three days after its date, by a release of Cohn by Marx and Kempner or Freiberg, Klein & Co.'s endorsement of his $800 note.

Part of the testimony of Marx objected to was this (fol. 25) :

"Marx said further: We released August Cohn as endorser on the $1,250 note by taking his note September 2, 1885, payable to Freiberg, Klein & Co., and endorsed by Frieberg, Klein & Co., and A. Strauss and J. J. Levy."

Edmonson, who was in the employ of Marx & Kempner, says (fol. 23):

"The controversy between Marx and Kempner, and Strauss and Levy, was finally settled in this way: In consideration of the agreement of Marx & Kempner to hold August Cohn harmless as endorser, they gave Marx & Kempner a note of August Cohn for $800, endorsed by Strauss and Levy, and by Freiberg, Klein & Co."

The Court will remember that in the conversation of Edmondson and Marx with Klein, Strauss and Levy, Levy was "particularly incensed" because Klein was to have fixed the attachments in such a way that Levy's brother-in-law, August Cohn, should be released, which would have been the result of levying the Marx & Kempner attachment, based on the $1,250 note, on which Cohn was endorser, ahead of Oliver & Griggs, but that Klein so arranged things that the attachment of his especial friends, Oliver & Griggs, was levied before Marx & Kempner's. Levy, in this conversation, asserted that he had taken legal advice,

"And would knock all the attachments out of Court, and would give away how the whole thing was done, and let none of the confidential debts be paid—a dollar, rather than Cohn should suffer."

This conversation was on September 2d, the second

day after writing the letter of August 31, which contained the following threat:

"Now, you well know that all parties concerned have agreed not to let A. Cohn suffer, nor shall he do so."

This, followed by Levy's announcement to Klein and others, on September 2 that he would expose the entire fraud, brought about a settlement by which, according to Edmondson's statement,

"In consideration of the agreement of Marx and Kempner to hold Levy harmless as indorser they gave Marx & Kempner a note of August Cohn for $800 endorsed by Strauss and Levy and by Freiberg, Klein & Co" (fol. 23).

At every turn of this transaction Klein appeared. He signed the attachment affidavits, was ready to swear to them; arranged that the Marx & Kempner attachment, which would have protected Cohn, should be junior to that of Oliver & Griggs. The reason of this is explained by the testimony of Marx (fol. 24) that Klein

"In explanation why Oliver & Griggs' attachment was given precedence over that of Marx & Kempner, said that he was under some obligations to Oliver & Griggs to see that they did not lose anything; and furthermore that it would have a better effect to put Oliver & Griggs ahead, as they were residents of Dallas."

Soon after the failure, Freiberg, Klein & Co. secured the valuable services of Levy as traveling salesman, and at a later date employed Strauss. Both of them were in the employ of the garnishees at the time of the trial

(fol. 33), both placed in positions of trust by the man who was ready to swear that they

"had disposed of their property for the purpose of defrauding their creditors."

It is now easy to see the relationship of this letter to the case. Strauss & Levy had intended that Levy's brother-in-law, Cohn, was to be protected from liability on his endorsement of the $1,250 note held by Marx & Kempner by priority of attachment; but Klein, who bossed the job for them, being under some obligations to Oliver & Griggs, "*to see that they did not lose anything*," pushed the latter in ahead. Levy became particularly incensed, and by the letter in question threatened ("nor shall he do so"), and in the conversation of September 2d, again threatened Marx in the presence of Klein. Then Klein and Marx surrendered, and agreed to release Cohn, Marx and Kempner taking his note for $800, with the endorsement of Freiberg, Klein & Co., doubtless with the understanding that Freiberg, Klein & Co. should pay the note for Cohn.

Thirdly. The other objection to testimony seems to me to be of little importance. It relates to the admission by the Court of Bradford's contradiction of Klein, upon the question whether any of Strauss & Levy's whiskey went to Paschal Tucker. My learned adversary holds that this was a collateral question, as to which Klein's statement was final. It seems to us anything but collateral. It bears upon the credibility of Klein, and relates to the direction which Klein gave to the property of

Strauss and Levy which he bought. The sale was but the fruition of the conspiracy, and this testimony establishes that Klein was not a veracious witness, that the property did not all go to Freiberg, Klein & Co., at Galveston, but some of it to Tucker, the former bookkeeper of Strauss & Levy, possibly as a reward for silence.

The Court will observe how widely this case differs from *Winchester & Partridge Manufacturing Company vs. Creary*, 116 U. S., 161. The testimony in that case consisted of admissions of the *vendor* after sale, sought to be supported as evidence of conspiracy.

The testimony in the present case consists of the admissions of the *vendee*, before the conspiracy *had* expired and its full fruition been accomplished, *dum opus fervet.*

No admissions of Strauss and Levy, made in the absence of Klein, were offered. They would, it seems to me, have been competent in this case, because the conspiracy was established by independent testimony, and these admissions were not needed to prove its existence. But the admissions of Klein, a party to the record, the chief conspirator, were competent, whenever made.

They were the admissions of a defendant.

II.

Instructions of the Court.

It must be remembered that Hoffheimer Brothers were creditors of Strauss & Levy, entitled as such to

object to any transaction of their debtors which might have the effect to hinder, delay, or defraud them.

Judge McCormick instructed the jury thus (fol. 51):

"A failing debtor has the right to pay one creditor in full, though he may not be able to pay others anything, and a *bona fide* creditor of a failing debtor may receive satisfaction of his debt in the transfer of bills, as well as in money, but is required to exercise the utmost good faith in such transaction, and to take no more in value than is reasonably adequate to pay his debt, and to so deal with said failing debtor as only to obtain satisfaction in good faith of his own debt, and not use his own debt, however honest it may be, as a shield to said debtor or an impediment to other creditors in reaching other assets of said failing debtor.

If, then, you believe from the proof in this case that the plaintiffs have a valid, subsisting, unsatisfied judgment against Strauss & Levy for something over eleven thousand dollars, or the amount claimed by them, and that Strauss & Levy were insolvent on the 10th day of August, 1885, and that the fact of said insolvency was then known to Sam. Klein or such facts with reference to them were then known to him as would have prompted a reasonable and fair-minded man to make inquiry with reference thereto, and that such inquiry would have resulted in a knowledge of said fact, and that under these circumstances said Sam. Klein, on behalf of the garnishees took the bills receivable aforesaid, and that the garnishees have received, and for the purposes of this litigation now have, of the proceeds of said bills receivable the sum of near ten thousand dollars (exact sum is shown by the proof as said above), and have still uncollected bills of value, you will find the garnishees liable to the plaintiffs in the amount so collected and the value found by you of the bills uncollected found by you—that is, return a verdict for the plaintiffs for the amount so shown by the proof to have been received by said garnishees and the value of the uncollected bills, if the sum of these do not exceed plaintiffs' debt, unless you believe from the proof that the garnishees were in fact and in good faith creditors of Strauss & Levy in the full sum claimed by said garnishees, and that in the dealings of Sam. Klein, on behalf of the garnishees,

with Strauss & Levy, on the 10th of August, by which he obtained said bills receivable and canceled the garnishees' claim against Strauss & Levy were in fact fair and honest and had with the single purpose of obtaining satisfaction of said debt, and that he received no more therefor than was reasonably worth the amount of said garnishees' said debt.

If the proof does so satisfy you of the honest fairness of the garnishees' claim against Strauss & Levy, and of the honest fairness of Sam. Klein's dealings with them on the 10th of August, 1885, and that he received no more from them than was reasonably sufficient to satisfy the garnishees' demand, you will find for the garnishees.

Any subsequent conduct of Sam. Klein, in reference to the demands of other creditors, cannot affect his dealings with Strauss & Levy further than as circumstances which it is proper for you to consider in determining whether said Sam. Klein, in his dealings on the 10th of August, 1885, with Strauss & Levy, was acting in perfect good faith and with the sole purpose of obtaining satisfaction of an honest debt due the garnishees, as they claim."

I have made this long extract from the charge, because it is only fair to the trial Judge.

Postponing, for the present, an examination of the question whether the Judge was right in saying to the jury that the value of uncollected bills receivable might be included in the verdict, the rest of the charge is and ought to be the law of the land, as it seems to me.

Strauss and Levy had been in possession of these bills receivable; they were their property. At the time of the trial Freiberg, Klein & Co. were in possession of them, or their money proceeds. The Hoffheimer Bros. had the right to claim that Strauss and Levy in dealing with their creditors, if they intended to make a preference, should do so openly, in good faith, and by a transaction which would not reduce their assets beyond the

amount of the debt they thereby paid. If this were the character of Freiberg, Klein & Co.'s dealing with Strauss and Levy, it should be upheld. If not, then Hoffheimer Brothers have the right to recover from them, as fraudulent vendees, the amount of assets of Strauss and Levy found in their hands.

The moment that Klein, knowing Strauss & Levy's insolvency, took the bills receivable, he took them with knowledge that the effect of the transaction would be to hinder and delay, if not defraud, the creditors of Strauss & Levy, among whom were Hoffheimer Brothers. Of course, he might do this, if he took the property in good faith for full value, with the single purpose of protecting himself; but it is for him to show that he paid value in good faith. This is established by the cases of

Callan vs. Statham, 23 How., 477.
Walcott vs. Almy, 6 McLean, 23.
Hubbard vs. Allen, 59 Ala., 283.
Hamilton vs. Blackwell, 60 Ala., 545.
Harrell vs. Mitchell, 61 Ala., 270.
Buchanan vs. Buchanan, 72 Ala., 55.
Zelnicker vs. Brigham, 74 Ala., 598.
Owens vs. Hobbie, 82 Ala., 466.
Wedgworth vs. Wedgworth, 84 Ala., 274.
Whaun vs. Atkinson, 84 Ala., 592.

Also by the very recent case of *Fisher vs. Moog*, decided by Judge TOULMIN in the Circuit Court of the United States for the Southern District of Alabama, August 28, 1889, reported in 39 Federal Reporter, 665.

The rule is thus stated by the learned Judge:

"A conveyance of property as against the existing creditors of the grantor cannot be supported unless shown to have been founded on an adequate and valua-

ble consideration, and when between the grantee and an existing creditor a controversy arises as to the validity of the conveyance, the *onus* of proving that it was founded on an adequate and valuable consideration is cast on the grantee. * * * The relationship of the grantor and grantee, the pendency or apprehension of suits on pecuniary debts or liabilities then existing, are circumstances from which unfavorable presumptions are drawn, and which call for evidence of a full and valuable consideration, and the burden rests on the grantee to repel these presumptions, and the sufficiency of the proof of a consideration must depend on the relations existing between the parties, the circumstances surrounding them when the transaction was entered into, and their subsequent conduct in reference to it. Clearer and more convincing proof will be required if these are calculated to excite a just suspicion of the fairness of the transaction."

In *Oppenheimer vs. Halff*, 68 Texas 409, the Court below gave the following charge (p. 411):

"If the jury believe from the evidence that said transfer was made by Burkhart before the levy, to the claimants, in satisfaction and payment of a debt or debts at that time existing and due from said Burkhart to the claimants, and if the latter acted in good faith in the transaction, then the jury will find for the claimants who are defendants, unless the jury believe from the evidence that the claimants, by said transfer, obtain more property of the debtor than was (under all the circumstances of the case which relate to the value of the goods and the mode and cost of realizing the debt therefrom) reasonably required to discharge their debt."

The Court of Appeals characterized this charge as a correct statement of the law in the abstract. The burden was not placed in the present case upon the vendees, Freiberg, Klein & Co., any more stringently than this charge required in that case.

At page 412 the Court of Appeals defined the settled practice of the Courts of Texas by saying that, if an in-

struction be in the main correct or do not directly misstate the law, it cannot be taken advantage of except by a special instruction on the part of the party complaining.

The only special instruction asked in the present case upon this branch of it was in the following words (fol. 15):

"The presumption of law is that the answer of the garnishees is true, and the burden of proof is upon the plaintiff to show that it is incorrect."

This was objectionable because it asked for the statement of a purely abstract proposition, a practice forbidden by the following decisions of this Court:

Hamilton vs. Russell, 1 Cranch, 309, 313.
Etting vs. U. S. Bank, 11 Wheat., 74–75.
Rhett vs. Poe, 2 How., 458.

It seems to me also that the instructions given by Judge McCormick were strictly within the rule thus stated in *Jones vs. Simpson*, 116 U. S., 609, 610:

"When, at the trial of such an action, it is proved that the vendor made the sale with fraudulent intent to hinder and delay his creditors, the burden is thrown upon the vendee to prove payment of a sufficient consideration, but this being established, the burden is then upon the creditors attacking the sale to show bad faith in the vendee."

A man's motives are to be deduced from his conduct. The Court told the jury that if the plaintiffs were creditors of Strauss & Levy, as they claimed, for something over $11,000, and Strauss & Levy were insolvent, and Klein knew it, or had knowledge of such facts as would have prompted inquiry, and such inquiry would have resulted in knowledge, and under these circumstances

Klein, on behalf of the garnishees, took the bills receivable, the plaintiffs would be entitled to recover, unless the garnishees were in good faith creditors in the sum claimed by them, and that the dealings of Klein on their behalf with Strauss & Levy were in fact fair and honest, had with the purpose of obtaining satisfaction of their debt, and that he received no more therefor than was reasonably worth the amount of said garnishees' said debt. Proof that the plaintiffs were creditors, that Strauss & Levy were insolvent, and that Klein knew it when he took the goods, certainly established that the effect of the transaction would be to hinder and delay, if not defraud, the plaintiffs, and thus established presumptively that the transaction was unfair and dishonest, throwing the burden of proof on the defendants to show that they paid full value for the property. The Circuit Court did not even go so far as this. All the testimony being before the Court, the Judge instructed the jury, *not* that if the plaintiff's were creditors, Strauss & Levy insolvent, and their insolvency known to Klein, the burden of proof was thereby thrown upon the defendants, *but* that these facts would justify a verdict for the plaintiffs, unless the jury believed from the proof (*not* unless the defendant proved—*not* unless the jury believed from the proof given by the defendants—*but* unless the jury believed from the whole proof) that the creditors were in good faith creditors in the full sum claimed; that the dealings of Klein were honest and fair, had with the purpose of obtaining satisfaction of the debt; and that he received no more than was reasonably worth the amount of his debt. This was not a charge transferring the burden of proof from the plaintiffs to the defend-

ants. It was based upon the entire case, which presented all the testimony to the jury, and in which the Court had already directed the jury that a creditor of a failing debtor might receive satisfaction of his debt by transfer of bills receivable, but must use good faith in such transaction and take no more value than might be reasonably adequate to pay his debt, and not use his debt as a shield to the creditor or an impediment to other creditors in reaching other assets of the failing creditor. If the garnishees desired a more specific charge with regard to the burden of proof, they should have resorted, not to the abstract proposition they in fact submitted to the Court, but to the correct practice, established in Texas, of asking a special instruction applicable to the testimony. This they omitted to do, and, by omitting to do, forfeited their right to object to the charge in the form in which Judge McCormick gave it.

III.

Amount of Verdict.

I am advised by my associates, who tried this case in Texas, that under the laws of that State choses in action are not subject to garnishment, and that the trial Judge erred in permitting the jury to assess the value of uncollected bills receivable. I quote from the brief furnished me by Messrs. Shepard & Miller, as follows :

" But the error was an immaterial one, because the testimony of Klein showed that they had collected $12,165.41 with $500 additional admitted in cross-ex-

amination (see printed record, page 21). The Court permitted them a credit in the instruction to the jury to the amount of $2,362.99, cost and expenses in the collection of the fund, and in the maintenance of litigation (see printed record, page 15). The account shows attorneys' fees of $250 in this case, and about $2,000 for attorneys' fees and traveling expenses.

On the hearing of the motion for new trial we contended that the garnishees were not entitled to deduct from the fund any amount of attorneys' fees or expenses (see *Hobbs vs. McLane*, 117 U. S., 581, 582). We proposed to the Court, however, in the event that he should disagree with us, to remit all of the judgment in excess of the amount of funds in the hands of the garnishees. The Court concurred with us, that we were entitled to the whole fund, and the motion was overruled, and no remititur was entered. We suppose, if necessary, a remititur can be entered in the Supreme Court.

At the time the garnishees' answers were controverted, they had collected—according to their account rendered—only $2,923.61 (Record, p. 15).

We think it clear, however, that the effect of the garnishment proceeding must be determined by the status at the time of the judgment. Judgment should be rendered then against the garnishees for such sums as had been collected."

This clear and intelligent statement of my learned associates seems to leave the case without much necessity for further discussion, except on a single point. I would, however, direct the Court's attention to the following:

First. That in addition to the money received the garnishees admit that they took from one Watts, for one of the claims transferred, a house and lot in Alexander, Texas, in full settlement. They have it yet; it is worth about $500; they have not put it down in the list of amounts received on the claims and accounts and do not know why (fol. 38).

The total amount received by Freiberg, Klein & Co., as sworn to by Seinsheimer, was, on May 1, 1886, $12,165.41. To this add the Watts house and lot, and the total receipts are established to have been before the time of trial $12,665.41. Against this Frieberg, Klein & Co., charge certain expenses of collection aggregating $2,362.99. In this they include fee paid Wright, Wright & Eckford $250, for services in this case. Another item is " attorneys' fees and travelling expenses, $2,000." This statement makes very manifest nat the recovery was for less than the amount the garnishees were fairly chargeable as received from the bills receivable before and at the time of trial.

There cannot be a reversal with a *venire facias de novo* for this reason. And if there is to be a modification of the judgment, it cannot extend beyond the excess above the true amount of judgment.

The remaining question is, whether the true amount is by the laws of Texas to be determined by the condition of the account at the time of trial, or at the time when the garnishees answer was controverted by reply.

Part of the Texas Statutes upon this subject has been copied in the brief of my learned friend Mr. Morris, as follows :

" Art. 205. Should it appear from the answer of the garnishee, * * * or should it be otherwise made to appear, * * * that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the Court shall render judgment for the plaintiff against the garnishee for the amount so admitted or found to be due to the defendant from the garnishee," etc.

" Art. 206. Should it appear from the garnishee's answer or otherwise that the garnishee has in his pos-

session, or had when the writ was served, any effects of the defendant liable to execution, the Court shall render a decree requiring the garnishee to deliver up to the Sheriff," etc.

"Art. 207. Should the garnishee be adjudged to have effects of the defendant in his possession as provided in the preceding article, and fail or refuse to deliver them, * * * the garnishee shall be cited to show cause at the next term of the Court why he should not be attached for contempt of Court. * * * And should the garnishee fail to show some good and sufficient excuse for such failure or refusal, he shall be fined for such contempt and imprisoned until he shall deliver such effects."

To these I add the following :

"Art. 208. Where the garnishee is an incorporated or joint stock company, and it appears from the answer, or otherwise, that the defendant is, or was when the writ of garnishment was served, the owner of any shares of stock in such company or any interest therein, the Court shall render a decree ordering the sale under execution in favor of the plaintiff against the defendant of such shares, or interest of the defendant in such company, or so much thereof as may be necessary to satisfy such execution."

"Art. 220. It shall be a sufficient answer to any claim of the defendant against the garnishee founded on any indebtedness of such garnishee, or on the possession by him of any effects, or where the garnishee is an incorporated or joint stock company in which the defendant was the owner of shares of stock or other interest therein, for the garnishees to show that such indebtedness was paid, or such effects were delivered, or such shares of stock or other interests in such company were sold under the judgment of the court in accordance with the provisions of this chapter."

It does not seem to me that there can be much question as to the meaning of these provisions. The State of Texas had a right to provide that garnishees should be liable for all moneys and

other property coming into their hands down to the time of trial. It has done so by the legislation in question. Alternative language is repeatedly used. The garnishee is liable, if at the time of the garnishment he had, or if he has in his possession effects of the debtor. The garnishee is liable if he was, at the time of the garnishment, or if he is indebted to the debtor. No doubt is left of the intention of the Legislature to hold the garnishee liable for effects coming into his hands after the date of garnishment, and also for his indebtedness to the defendant, created or existing after the garnishment. The question is, to what time does this liability of the garnishee to be subjected to the claim of the creditor continue.

The rules of grammar require the inquiry to relate to the time of trial. The tense used is the present; "is indebted," "has effects." Grammar is not incorrectly used here, and that the time of trial is the date meant by the language of the statute, is shown by Section 207. If the garnishee

"be adjudged to have effects of the defendant in his possession,"

means "if he have at the time of the trial," and after demand made by the Sheriff or Constable, if he fail to excuse himself for not delivering, then he shall be fined and imprisoned until he deliver such effects. This language relates to a time at least as late as the day of trial. It is certain from this that the State of Texas intends to hold a garnishee liable for effects, which at the time of trial he may have in his possession and refuse to surrender to the Sheriff or Constable on demand.

The same is true where the garnishee is an incorporated or joint stock company. The remedy given in case the defendant—

"is, or was, when the writ of garnishment was served, the owner of any stocks,"

is a decree for sale of the shares; and Article 209 provides that the Sheriff or Constable making such sale

"shall execute a transfer of such shares or interest to the purchaser."

These provisions tend to illustrate Article 205, and convince me that the law of Texas, providing that if it be made to appear from the answer of the garnishee or otherwise, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the Court shall render judgment for the plaintiff against the garnishee, relates to an indebtedness existing at the time of the trial.

Upon this theory, which was adopted by the Court below, Freiberg, Klein & Co. became liable to Hoffheimer Bros. for $12,665.51, less whatever sum the Court may be of opinion it is proper to deduct by reason of the cost of reducing this sum from bills receivable to money. Certainly the fee paid to Wright, Wright & Eckford $250 for services in this case, cannot be the subject of such deduction, and I respectfully submit that a general item of "attorneys' fees and travelling expenses $2,000" should not be deducted. But supposing this to be otherwise, then the amount of $12,665.41 is to be reduced by $2,000, or at the most $2,112.99 (fol. 27), leaving an indebtedness recoverable

by Hoffheimer Bros. of $10,552.52, in which case a very small remittitur would be required.

This sum of $2,112.99 is made by deducting, from the total amount of expenses claimed by the garnishees $2,362.99, the sum of $250 paid Wright, Wright & Eckford.

The construction thus given to the laws of Texas is neither uncommon nor strained.

The writ of attachment in use in this country had its origin in the customs of the City of London (Drake on Attachment, § 1), where it was held that this process had the effect to subject assets coming into the custody of the garnishee, after the service of the writ.

In Bohun's *Privilegia Londini*, at page 197 (p. 255 of 3d Ed.), the following is said to be the rule prevailing in that City (italics in original):—

"If A attaches the Monies or Goods of M in the Hands of R in this (Maior's) Court, and if R have no Monies or Goods in his hands belonging to M at the time when the Attachment shall be made; and it shall happen that six Months after, R shall become indebted to M or have Goods in his Hands belonging to M and the Plaintiff A by virtue of the Attachment made as aforesaid, shall recover the Money or Goods he shall prove came to the Hands of R after the Attachment made. The general issue upon all Attachments being, *Whether R, who is called the Garnishee at the time of the Attachment made, or at any time after, had any Monies or Goods of M in his Hands.*"

It appears, upon examination, that, although Bohun fails to give the proper credit, this passage was copied by him from an anonymous work which appeared in 1680, entitled "*Lex Londinensis*, or the City Law showing the powers, customs and practice of all the City Courts" (p. 20). Both these volumes are in the library of Columbia College.

The passage, in a slightly varied form, was quoted by Giles, *arguendo*, in *McDaniel vs. Hughes*, 3 East, 367, 374, where the learned counsel cited the following passage from 1 Comyn's Digest, Title Attachment, C, page 451 :—

"If goods come to the hand of the garnishee after an attachment granted in the Mayor's Court, they may be attached."

The reporter adds :—

"For which he cites *Privil. Lond.*"

The passage cited follows, being the same quoted by me above. Either the reporter or the annotator, in a note referring to the page of Bohun's *Privilegia*, says :—

"The page referred to is 197. In my edition, which is the third, it is 255."

The same learned counsel, (Giles), had previously argued (p. 374) that :—

"The proceedings in the Mayor's Court in this instance have been according to the long established usage of that Court and part of the custom of foreign attachment recognized by the Courts of Westminster. If the property of the defendants below be found to have come into the hands of the garnishee before plea pleaded it is liable to be attached by the custom."

The reporter then adds the following, (brackets his) :—

"(The Common Serjeant as *Amicus Curiæ* asserted such to be the constant practice and observed, that there was no inconvenience in it for if the garnishee came in immediately and plead he got rid of the attachment at once, but if he chose to wait it was reasonable that he should answer up to the time when he came in; otherwise he was liable to be harassed with new attachments till the expected property was fixed in his hands.)"

In 1 Rolle's Abridgment, at page 553 G 4, it is said that the attachment extends according to the notice to property or debts afterwards accruing due to the defendant before appearance ; and in Pulling on the Laws and Customs of London, Note *t*, to page 190, it is said that money not due may be attached, to be paid over.

I find the following passage at *page 27 of Locke on the Mayor's Court of London :—

"Although no action can be entered by the obligee for a debt upon a bond, bill or note, the date of payment of which has not arrived, * * * still the plaintiff would thereupon have judgment against the garnishee for the money attached, but execution cannot be awarded for the money until it become due."

Mr. Locke also says *p. 32 :—

"Goods or money coming to the hands of the garnishee belonging to the defendant, or the garnishee becoming indebted to the defendant between the attachment and the plea, such goods, money and debts may be recovered in the attachment. The general issue in all attachments being whether the garnishee at the time of the attachment made or at any time after (that is before plea pleaded) had any money or goods of the defendant in his hands."

The same rule prevails in several American States with differences according to the views of public policy entertained by the various legislatures.

Chief-Justice DRAKE, in his work on Attachment (6th Ed.), at page 671, says :—

"In New Hampshire, in Vermont, and in Pennsylvania since 1836, the garnishee is chargeable not only for the effects in his hands when he was summoned but also for whatever may come into his hands or become due from him to the defendant between the time of the garnishment and that of the answer. In each case however, this results, from peculiar statutory provisions. In Maryland the practice is to condemn all

property of the defendant's in the hands of the garnishee at the time of trial. And in New York where garnishment as it elsewhere exists is not known, but where the service of the attachment upon a person having property of the defendant in his possession, is, in effect, an attachment of the property, it was held, as between different attaching creditors, that an attachment served on the 6th of April, upon a factor having in his hands property of the defendant and also bills of lading of goods consigned to him by the defendant, but not yet received, was a continuing attachment, which was entitled to precedence of one served on the 15th of June, after the reception by the factor of the goods specified in the bills of lading.

Senator DANIEL, in his work on the Law and Practice of Attachment under the Code of Virginia, Section 259, says:—

"A debt not due may be attached, and judgment against the garnishee in respect to it may be rendered at once, but execution cannot issue in favor of the plaintiff until it becomes due. It is not necessary that the time of payment should fall before the garnishee's examination or answer. The foreign authorities cited in the notes sustain these propositions. They have not been adjudicated in Virginia. It has been the practice in some of the Circuit Courts to continue the case as to the garnishee until his liability matured, instead of giving judgment beforehand."

The cases cited by the learned author consist of the passage already quoted by me from Locke, and of the following: *Walker vs. Gibbs*, 2 Dall., 211; *Staples vs. Staples*, 4 Greenleaf, 532.

I quote the following which the learned author subjoins as *note* 2 of § 259:—

"The garnishee may plead it is true that he hath so much money in his hands, but that the same is not due or payable to the defendant till a certain day to come. Locke, p. [28 *]; *Hals vs. Walker*, 1 Roll. Abr., 553; *Robbins vs. Standard*, 1 Siderfin, 327; *Self vs. Kennicot*,

2 Shower, 506. It was held in Elizabeth's reign that there could not be an attachment of a debt not payable *Dalton vs. Selly*, Cro. Eliz., 184; *Leukner vs. Huntley*, *id.*, 713; Locke [28 *], *n.* (z); but the cases above cited, decided in 2 Car., 2, 19 Car., 11 and 2 and 3 Jac. 2, respectively, established that where there is *debitum in præsenti*, though *solvendum in futuro* it may be attached before it is payable, though it cannot be condemned until after." (5 Robinson's Practice, 834).

At Section 260 Mr. Daniel says (italics his):—

"Section 17 of Chapter 151 says: 'If it appear, etc., that at OR AFTER the service of the attachment *he was indebted* to the defendant, etc., or had in his possession or control any goods, chattels, and money, securities, etc., the Court may order him to pay the amount so due by him and to deliver such effects, etc." Query: As to meaning of words 'OR AFTER,' Is there any interpretation which can be given other than they were intended to apply to such debts and effects as came into being or into the hands of the garnishee between service of the writ and his answer?"

The language of the statute of Maryland expresses the same purpose as that of Texas, although in different words. The Maryland provision is this, (Code 1860, Vol. 1, page 48, Section 16):—

"In all cases of attachment, whether upon warrant, judgment or decree, the plaintiff may exhibit interrogatories in writing to the garnishees who shall * * * answer the said interrogatories touching * * * the property of the defendant in his possession or of or by him owing or due at the time of serving such writ of attachment or at any other time."

In *Glenn vs. Glass Company*, 7 Md., 287, St. George W. Teackle, *arguendo*, says:

"The moment Glenn was appointed trustee, by operation of law all the *property* of the insolvent passed to his hands and vested in him * * * The practice

for sixty years has been to condemn all property and credits in the hands of the garnishee *at the time of the trial.*" (Hinkley on Attachment, 51, 109).

The Court say (p. 296) :

" Besides, it has been the general practice under our attachment system under the authority of the Fifth and Sixth Sections of the Act of 1795, Chapter 56, to condemn all credits or property in the hands of the garnishee of the debtor at the time of the trial."

I do not refer to the customs of the City of London, or the statutes of these American States, as authorities bearing on the construction of the laws of Texas. except in this way, viz. : to prove that it has not been unusual, in the history of jurisprudence, to treat the garnishee as converted by force of the notice given him, or service upon him, into a trustee for the benefit of the creditor, of all assets of the judgment debtor coming into his hands after the service of the garnishment process. In London this liability seems to have ended at the time of plea pleaded, but to have applied to debts not yet matured.

In some of the American States the same rule is adopted. In Maryland the liability continues and applies to all assets coming into the hands of the garnishee until the time of the trial. Inasmuch as the mandate of the laws of Texas, according to the established rules of grammatical construction, by the use of the present tense, refers to the time of the trial and judgment of the Court, the Maryland rule would seem to be applicable in Texas.

The extent to which this question has come before this Court of Appeals of Texas, has only required that learned tribunal to hold that while promissory notes

in the hands of a garnishee are not liable to garnishment, collections on such promissory notes made after the service of the garnishment process, but before the filing of the answer, were subject to the plaintiff's claim.

The two cases in which this was held, *Tirrell vs. Canada*, 25 Texas, 455, and *Ellison vs. Tuttle*, 26 Texas, 283, did not involve the proposition now before this Court. In the former, there was no money on hand at the time the writ of garnishment was served, but before the time of filing his answer, the garnishee had collected $219. In the latter, the Court held that promissory notes in the hands of the garnishee were not liable to the garnishment, but that the sum of $185 collected upon such notes and admitted by the garnishee's answer to be then in his hands, was liable to be subjected to the plaintiff's claim. The *syllabus* of the case of *Tirrell vs. Canada*, is as follows:

"Promissory notes and accounts in the hands of an agent for collection, and which are uncollected are not the subject of garnishment in a proceeding by attachment or in a proceeding under the statute providing for the issuance of a writ of garnishment to satisfy a judgment against the owner of such *choses* in action.

Money which has been collected on such claims by the agent after the time of service on him of the writ of garnishment, and remaining in his hands when he makes his answer thereto, if the claim on which it was collected had not been assigned, is subject to the claim of the plaintiff in the proceeding, and was properly adjudged to him."

This case establishes, of course, though not more clearly than the express language of the statute, the liability of the garnishee for moneys coming into his hands after the service of the writ of garnishment, but

leaves open the question whether this liability ends with the answer of the garnishee, or continues to the time of trial.

For the foregoing reasons I respectively submit that there is no error in the record, and that judgment should be affirmed and the cause remanded for its collection.

GEO. HOADLY,
Of Counsel for Defendants in Error.

New York, November 11, 1889.